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JUDGES
OF THE
SUPREME COURT OF WASHINGTON

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ERRATA

ERRORS NOTED IN PREVIOUS VOLUMES

VOLUME 63

Page 201, line 18 from bottom, for frequently read fraudulently
Page 676, line 18 from top, transpose after line 19

CASES
DETERMINED IN THE
SUPREME COURT
OF
WASHINGTON

[No. 9459. Department Two. June 27, 1911.]

MARY COLE, *Appellant*, v. THE CITY OF SEATTLE,
Respondent.¹

MUNICIPAL CORPORATIONS—CLAIMS — PRESENTATION — REASONABLE REQUIREMENTS—FAILURE TO FILE—EXCUSES. It is a reasonable and valid requirement that claims against a city for personal injuries shall be in writing and verified and filed with the city clerk within thirty days; and the same is not excused or substantially complied with by a verbal notice to other officers, or by the statement of an officer that he would report the claim to the city council, or that a letter to a councilman was not answered or objected to.

SAME—EXCUSES FOR FAILURE TO FILE. An ordinance of a city requiring officers to investigate and report all claims or demands against the city that come to their knowledge does not excuse a claimant from filing a verified claim with the city clerk, after bringing it to the notice of an officer of the city.

SAME—WAIVER OF CLAIM. The requirement that a claim against a city must be presented to the city council before action brought cannot be waived by any officers of the city other than the city council.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 2, 1910, in favor of the defendant, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by a pedestrian through a defective sidewalk. Affirmed.

Philip Tindall, for appellant.

Scott Calhoun and *James E. Bradford*, for respondent.

¹Reported in 116 Pac. 257.

ELLIS, J.—The appellant brought this action to recover damages on account of personal injuries, claimed to have been received by stepping upon a defective plank in the sidewalk on one of the streets of Seattle. The complaint was demurred to on account of its failure to allege the presenting to the city council, and the filing with the city clerk, of a claim for damages in form and manner as required by the city charter. The recitals of the complaint on this point are as follows:

“(7) That on the 27th day of September, 1909, said sidewalk was repaired at the place where said accident occurred by employees of the defendant under the supervision of one John A. McCarty, a foreman of streets and sidewalks in defendant’s employ; that on the same day said McCarty called upon plaintiff and asked her whether or not she intended to prosecute a claim for damages against defendant, and plaintiff informed said McCarty that she would insist upon being paid reasonable compensation for the injuries received by her as above described. Plaintiff at said time asked said McCarty whom she should see with reference to obtaining a settlement from the city and McCarty thereupon informed plaintiff that he would at once report her case to the president of the city council; that he would advise a settlement of her case by the city as it would be advantageous to the city to settle it; he further stated to plaintiff that after he had reported the case it would go before the entire city council for action by that body.

“(8) That shortly after said conversation plaintiff’s daughter-in-law telephoned to the Honorable Hiram C. Gill, who was at that time president of the council of the city of Seattle, and also to Honorable ——— Armstrong, the member of said council from the twelfth ward of the city of Seattle, in which ward the scene of said accident was located, and informed them of the circumstances connected with said accident.

“(9) That on the 29th day of September, 1909, plaintiff deposited in one of the United States mail boxes in Seattle, Washington, a letter with postage prepaid addressed to Mr. Hiram C. Gill, who at that time was the president of the city council of Seattle, Washington; that said letter was in words and figures as follows: ‘Mr. Hiram C. Gill,

June 1911]

Opinion Per ELLIS, J.

President of City Council, Seattle, Washington. Dear Sir: I want to inform you that I moved from Tacoma, Washington, 19th and D. street and moved to 1453 Market Street Ballard station, Seattle, Wash. where I now reside for the past two months on the morning of September 25, 1909, while in company with my son at ten o'clock A. M. on 15 Ave. between 52 and 53 sts. when suddenly the sidewalk gave way and I went down in an excavation dislocating my spine and left hip and breaking bones in my left foot which has caused me intense pain and suffering I am under the expense of a doctor who is about to bring me a trained nurse and for this suffering and expense I am compelled to bring a claim against the city of Seattle, Wash. for settlement If you will kindly call or send your adjustor we may be able to settle out of court and avoid litigation yours respectfully Mary Cole Address Mary Cole 1453 Market Street Ballard Station Seattle, Wash. P. S. Your foreman on streets and sidewalks called to see me yesterday who said he would report the case but I thought I would write. Mary Cole';

"That neither plaintiff nor any one on her behalf has received any reply to said letter or any objection to its form or contents or any request for further information concerning any of the matters referred to therein."

The complaint then alleges the filing, on July 1, 1910, over nine months after the accident, of a verified claim, to the form of which no objection is taken. The court sustained the demurrer, and the plaintiff refusing to plead further, judgment was entered in favor of the city, from which this appeal was taken.

Section 29 of article 4 of the city charter, revised edition 1908, is as follows:

"All claims for damages against the city must be presented to the city council and filed with the clerk within thirty days after the time when such claim for damages accrued, and no ordinance shall be passed allowing any such claim or any part thereof, or appropriating money or other property to pay or satisfy the same or any part thereof, until such claim has first been referred to the proper department, nor until such department has made its report to the city council thereon, pursuant to such reference. All such

claims for damages must accurately locate and describe the defect that caused the injury, accurately describe the injury, give the residence for one year last past of claimant, contain the items of damages claimed, and be sworn to by the claimant. No action shall be maintained against the city for any claim for damages until the same has been presented to the city council and sixty days have elapsed after such presentation."

It is, of course, admitted that the verified notice of claim required by the above charter provision was presented and filed some months too late. The appellant contends, however, that the requirements of the charter were substantially complied with by the verbal notice to the street foreman, the telephone messages to the president of the council, and the member of the council for the ward in which the accident occurred, and by the letter to the president of the council. It is argued with much force that the end which these requirements were designed to subserve has been met by these informal notices to the persons mentioned, and that the law should receive a liberal construction in order to avoid the hardship incident to a literal enforcement of its terms. In support of the contention that the notice in this case should be held sufficient, counsel cites several cases in which claims have been sustained in this court by a liberal construction of the above charter provision or similar provisions. It has held that the provision requiring the claim to state the residence of the claimant "for one year last past" is not reasonable, and that all that concerns the city is the present residence of the claimant (*Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A., N. S., 938); that a general description of the injury is a reasonable compliance with the charter without particularizing as to all of its phases and consequences (*Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914); that any notice which describes the defect in the street with reasonable certainty sufficient for identification will answer, if not actually misleading (*Ellis v. Seattle*, 47 Wash. 578, 92 Pac. 431); that the failure to present and file the notice

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of claim within the time fixed by the charter may be excused by showing a physical or mental incapacity during that period such as to render it impossible for the claimant to comply (*Born v. Spokane*, 27 Wash. 719, 68 Pac. 386).

It is urged that the facts alleged in this complaint present a case of apparent hardship upon the appellant if the above charter provision is enforced as valid; but neither a liberal construction nor considerations of hardships to be avoided are sufficient reasons for the abrogation by construction of a charter provision which has long been held by this court constitutional, reasonable and in furtherance of justice. *Scurry v. Seattle*, 8 Wash. 278, 36 Pac. 145; *Born v. Spokane*, *supra*; *Postel v. Seattle*, 41 Wash. 432, 83 Pac. 1025; *Mears v. Spokane*, 22 Wash. 323, 60 Pac. 1127; *Ehrhardt v. Seattle*, 40 Wash. 221, 82 Pac. 296. To hold that notice to other persons than the persons designated in the charter to receive such notice would be sufficient, or to hold that the notice need not be verified as required by the charter, or that it may, without sufficient excuse, be presented and filed long after the time required by the charter, would not be to construe the provision as a court, but to legislate for the city concerning a matter which is within its power to fix by its charter, and which it has so fixed. We must continue to hold, as we have heretofore held, that provisions of this character, so far as they are reasonable, are valid, and must be complied with before an action such as they contemplate can be maintained.

The first question then arising is, Are the provisions which the appellant failed to meet reasonable provisions? Is it reasonable to require such claims to be "presented to the city council and filed with the clerk?" The answer must be in the affirmative. The purpose of the provision is to insure notice to the city, within the time fixed, of the things required to be set out in the notice. A claim presented to the city council and filed with the clerk is reasonably calculated to insure such notice. It is also a reasonable thing to require

of the claimant because the council must pass upon the claim, and because the clerk is the custodian of the records and minutes of the proceedings of the council. The framers of the charter were justified in believing it better calculated to insure intelligent and prompt action by the city than notice to any one else. In view of the multitude of city officers and employees, and the endless details of the business of a large city, it is obviously reasonable to require service of claims of injury upon some certain officer or body. No other method would insure its reaching the proper channels for investigation. The decided weight of authority sustains us in holding that provisions of this character are reasonable, and that notice to some other person than the person or body designated in the law is not a sufficient compliance therewith. *City of Fort Worth v. Shero*, 16 Tex. Civ. App. 487, 41 S. W. 704; *Denver v. Saulcey*, 5 Colo. App. 420, 38 Pac. 1098; *Dorsey v. Racine*, 60 Wis. 292, 18 N. W. 928; *Whalen v. Bates*, 19 R. I. 274, 33 Atl. 224; *Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80; *Seamons v. Fitts*, 21 R. I. 236, 42 Atl. 863; *Bancroft v. San Diego*, 120 Cal. 432, 52 Pac. 712; *Bausher v. St. Paul*, 72 Minn. 539, 75 N. W. 745; *Dalton v. Salem* (Mass.), 28 N. E. 576; *Harris v. Fond du Lac*, 104 Wis. 44, 80 N. W. 66; *McKenna v. Bates* (R. I.), 35 Atl. 580; *Doyle v. Duluth*, 74 Minn. 157, 76 N. W. 1029.

Again, is it reasonable to require that the claim be sworn to by the claimant? This also must be answered in the affirmative. One of the principle purposes of the provision is to prevent the allowance of fraudulent or exaggerated claims. If it is reasonable to require a written claim at all it cannot be said that it is any less reasonable to require the claimant to swear to it. The oath is at least an earnest of that good faith which the city has the right to demand. *Griswold v. Ludington*, 116 Mich. 401, 74 N. W. 663; *Borst v. Sharon*, 24 App. Div. 599, 48 N. Y. Supp. 996.

It is reasonable also to require that such verified notice be so presented and filed "within thirty days after the time

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when such claim for damages accrued." This court has so held in *Born v. Spokane*, *Ehrhardt v. Seattle*, and *Postel v. Seattle*, *supra*, where the question of time was directly involved.

All these requirements are found in the above quoted charter provision. That provision reasonably construed is valid, and the complaint does not show that any of these things has been substantially complied with by the claimant. She presented no claim to the council within the thirty days. She neither filed nor presented nor served any sworn claim with, to, or upon, any one within the thirty days. While she does allege a conversation with a street foreman and councilman, and the presiding officer of the council, these, if notices at all, were verbal notices, and are not a compliance with the charter provision, substantial or otherwise. Little more can be claimed for her letter to the president of the council. If the city can reasonably require a sworn claim, then a letter unverified actually presented to the council and filed with the clerk would not avail in the absence of clear acts of waiver by the council. *Dalton v. Salem*, and *Borst v. Sharon*, *supra*.

As this court said in *Mears v. Spokane*, *supra*, at page 327:

"If it be conceded that the city of Spokane has power to insert a provision of this kind into its charter,—a question not raised in the present action,—the presentation of a claim to the city council is made a prerequisite to the right to bring an action for personal injuries, and the courts are not at liberty to say that it may be disregarded, or that something else may be substituted for it. *Curry v. Buffalo*, 135 N. Y. 366 (32 N. E. 80); *Borst v. Town of Sharon*, 48 N. Y. Supp. 996; *Wall v. Town of Highland*, 72 Wis. 435 (39 N. W. 560); *Weber v. Town of Greenfield*, 74 Wis. 234 (42 N. W. 101)."

The second question is, do the allegations of the complaint show a sufficient excuse for not complying with the above provisions? The only grounds of excuse alleged are, that the street foreman said he would report the matter to the council

and advise settlement, and that plaintiff's letter to the president of the council remained unanswered and unobjected to either as to form or contents. These things cannot be held to excuse a compliance with requirements so plain and easy of performance as those set out in the city charter, no matter how liberally those provisions are construed.

In aid of the contention that these conversations and this letter ought to be held a sufficient excuse for lack of the sworn notice, or as a waiver of other notice by the city, counsel for appellant cites Ordinance No. 4,187 of the city of Seattle, which reads as follows:

"Whenever any officer or employe of the city of Seattle shall be informed of any act, matter or event from or out of which any suit, claim or demand against said city may arise, it is, and shall be the duty of such officer or employe to forthwith fully investigate all the circumstances connected in any way with the happening of such act, matter or event, together with all of the witnesses thereto, and make a full report of the result of such investigation to the corporation counsel of said city."

This ordinance was manifestly intended as an added safeguard to the city against fraudulent claims. It was never intended to operate as a repeal, or substitute for, or modification of the charter provision. Compliance therewith by any officer or employee of the city was never intended to operate as a waiver of the charter requirements by the city. To so hold would give this ordinance an effect exactly the opposite of that which its terms plainly import. *Hoyle v. Putnam*, 46 Conn. 56.

The city council is the only authority which, under the organic law of the city, can take cognizance of such claims, and it necessarily follows that it is the only authority which can waive compliance with the charter. Logically, a waiver could only be predicated upon some act of the council treating the defective or belated notice as a valid claim. It would be illogical to hold that any other person or body could waive for, or create an estoppel against, the city except that body

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which the law has designated to receive and act upon the claim. Any other construction would nullify the charter requirement. No act of the council was alleged in the complaint here in question as ground of waiver by, or as the basis of an estoppel against the city. The complaint does not allege that the claim, either verbal or written, ever reached the council within the thirty days, or that the council ever did any act which could be construed as a waiver after the filing of the sworn claim about nine months later. Neither of the persons to whom the informal notices were given was authorized to act for the council or for the city in that behalf. It would be a dangerous doctrine fraught with far reaching mischiefs to announce that any officer or employee of the city could bind the city or estop it of any right as to matters by its charter placed expressly within the cognizance of the city council only. If such a doctrine were adopted it would lead to endless confusion in the performance of contracts with the city, and in the administration of its many diverse business interests. We, therefore, hold that a compliance with the reasonable terms of the charter provision cannot be waived by statements or acts of any officer or employee of the city other than the city council, and that to establish a waiver by the council some affirmative cognizance of the claim, other than rejection by the council, must be pleaded and proved. In this we are in accord with the decided weight of authority. *Shea v. Lowell*, 132 Mass. 187; *Veazie v. Rockland*, 68 Me. 511; *Starling v. Bedford*, 94 Iowa 194, 62 N. W. 674; *Dalton v. Salem*, *supra*; *Kennedy v. Mayor etc.*, 18 Misc. 303, 41 N. Y. Supp. 1077.

The demurrer was properly sustained. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 9434. Department Two. June 27, 1911.]

MARTHA OWEN, *Respondent*, v. THE CITY OF SEATTLE,
Appellant.¹

MUNICIPAL CORPORATIONS—NEGLIGENCE—PLEADING—DESCRIPTION OF INJURIES—AMENDMENT—ISSUES AND PROOF. A complaint for personal injuries alleging a severe contusion of the leg, hip, and side, causing severe nervous shock and constant confinement in bed, may properly be amended at the trial to state that the injuries were permanent, and admits of evidence of a condition of extreme nervousness, a twitching of the muscles and palsy of the head, as the natural or probable consequences of the injury.

SAME—DEFECT IN SIDEWALKS—NOTICE OF DEFECT—INSTRUCTIONS. In an action against a city for injuries sustained on a defective sidewalk, after instructing the jury as to the law of actual and constructive notice of the defect, it is misleading to state that there is a third kind of notice where the city itself is doing the work which causes the defect.

APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action against a city for injuries sustained through a defective sidewalk, error in instructions as to the city's actual notice of the defect is not prejudicial, where there was ample evidence of constructive notice to sustain the verdict.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,500 for personal injuries will not be held excessive, where the plaintiff received a severe contusion on her leg, hip, and side, had been confined to her bed ever since, and there was evidence warranting the jury in finding permanent injury from nervous shock.

Appeal from a judgment of the superior court for King county, Gay, J., entered September 29, 1910, upon the verdict of a jury rendered in favor of the plaintiff, for \$2,500, in an action for personal injuries sustained by a pedestrian through a defective sidewalk. Affirmed.

Scott Calhoun and Stephen V. Carey, for appellant.

Albert D. Martin and Walter A. Keene, for respondent.

¹Reported in 116 Pac. 261.

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Opinion Per CHADWICK, J.

CHADWICK, J.—Plaintiff fell upon a defective sidewalk in the city of Seattle, and from a judgment in her favor, the city has appealed.

Within the statutory time—thirty days—she filed a claim notice with the council, in which she described her injuries, claiming that by reason thereof she was, and ever since has been, confined to her bed. Her claim being rejected, she brought this action, alleging “that the injuries received by claimant consist in this, to wit: Her left ankle and foot were badly sprained and bruised. She received a severe contusion of her right leg, hip and side. Said fall also caused her to be sick, sore, lame and disordered, gave her a severe nervous shock and caused her to have nervous chills and vomiting and to suffer great bodily pain and mental anguish, and caused her to be, and she has ever since been, confined to her bed.” On the trial, testimony tending to show that her injuries were permanent was offered and received over the objection of the defendant, the court allowing the complaint to be amended by adding the words: “that plaintiff’s said injuries are of a permanent nature.” Thereafter defendant’s counsel said:

“In view of the fact that the plaintiff is now claiming permanent injury where none is charged in the claim or complaint, and the court is going to permit proof of it, I now move that the court appoint a commission to make an examination of this subject. We have had no notice of course of any claim of permanent injury and had supposed that an examination at this time would not be of any value, but they are claiming permanent injury. We desire an examination.”

Two physicians were accordingly appointed by the court to make a physical examination of plaintiff, and were thereafter called as witnesses for the city. No continuance was asked.

It is insisted that this case falls within the rule of *Horton v. Seattle*, 53 Wash. 316, 101 Pac. 1091. There the claimant undertook to recover for a specific injury to her eyes, which

she admitted she knew of at the time her claim was filed with the city, and as we there say:

"It is clear, therefore, that the respondent knew of this injury to her eyes some two weeks before she filed her claim, and she did not base any damage thereon."

Here the statements of the claim and the complaint, as amended if not before, were broad enough to cover the natural or probable consequences of the injury. The case falls rather within the rule of *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, where it was held that a claim will not be construed with technical strictness, or a general statement of the injuries received preclude proof at the trial of the natural and probable results of the injuries. See, also, *Falldin v. Seattle*, 57 Wash. 307, 106 Pac. 914; *Pierce v. Spokane*, 59 Wash. 615, 110 Pac. 537. Plaintiff's permanent injuries are shown to be a condition of extreme nervousness, a twitching of the muscles, and a palsy of the head following the injury, her health having been good prior to the accident. The distinction between the *Horton* case and this one is pointed out in the *Horton* case, where the reception of the evidence tending to show the consequential injury or symptom was held to be error because it came as a surprise, and a continuance had been refused.

It is next contended that the court erred in this: After defining actual and constructive notice, the court said:

"However, there is another kind of notice, and that is notice of this character: Where the city itself through its own agents and employees are doing work in the prosecution of the work of the city, the sidewalk is torn up by those workmen or displaced, then it becomes their duty to immediately put it back in a reasonably safe condition, and a failure of them so to do, to put it back in a reasonably safe condition, and an accident occurring through that fault and without any contributory negligence on the part of the pedestrian, would render the city liable for that failure to do those things that reasonable caution and prudence would require."

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Defendant had requested the following instruction:

"You are instructed that the city is not charged with notice of a defect merely by reason of the fact that some subordinate employee of one of the city departments, having no supervision of the streets, may have known of it."

We think the requested instruction states the law, and it should have been given. *Cole v. Seattle*, ante p. 1, 116 Pac. 257. The instruction given is bad for several reasons. There are but two kinds of notices—actual and constructive, and a reference to a "third kind of notice" might have a tendency to mislead the jury. The only meaning we can give to the instruction is that the court was endeavoring to more elaborately define actual notice. The instructions were given orally, and as is too often the case, inapt and ill-considered expressions, tending to inaccuracy, creep in. There is ample evidence to sustain the theory of the plaintiff that the defect had existed for a sufficient length of time to imply a notice to the city; and as actual notice is not necessary, we will presume in aid of the verdict that the jury found that the city had constructive notice. The instruction complained of does not go to the primary right of recovery, but rather to a condition which might bar the right of recovery. No new general issue is injected into the case. Therefore, there being evidence of notice to which the verdict may attach, it will be allowed to stand.

Finally, it is contended that the verdict is excessive and against the evidence. The writer of this opinion has no hesitation in saying that this is a doubtful case, and if sitting as a juror he would hold that it was not shown, considering all the evidence, that plaintiff's present condition is due to the physical injury which she sustained. But the jury have believed her and her witnesses, and we must confess that they were in a better position to weigh the evidence than we are; and believing her, there was sufficient evidence to sustain, not only the general verdict, but the amount of the recovery.

Judgment affirmed.

DUNBAR, C. J., CROW, MORRIS, and ELLIS, JJ., concur.

[No. 9539. Department One. June 27, 1911.]

WILLIAM ALLARD, *Respondent*, v. NORTHWESTERN CONTRACT COMPANY, *Appellant*.¹

MASTER AND SERVANT—BLASTING—WARNING—QUESTION FOR JURY. In an action by an employee injured by a blast, whether a warning was given is for the jury, where the plaintiff and another witness testified that no warning was given, although the greater number of witnesses testified that one was given.

MASTER AND SERVANT—BLASTING—DUTY TO WARN—FELLOW SERVANTS. The duty of giving a warning of a blast in a quarry is a non-delegable duty of the master, and the defense of fellow servant is not available.

MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action by an employee injured by a blast, it is error to exclude evidence tending to show that the plaintiff had become careless and on different occasions had failed to get under cover when a warning was given, especially where there was a disputed question of fact as to whether a warning had been given.

WITNESSES—CROSS-EXAMINATION—IMPEACHMENT OF PARTY. Cross-examination of the plaintiff as to his carelessness in heeding a warning does not make him the defendant's witness so as to preclude other testimony contradicting him on that point.

Appeal from a judgment of the superior court for Pierce county, Easterday, J., entered November 22, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through an explosion in a quarry. Reversed.

F. S. Blattner and *L. B. da Ponte* (*W. C. Morrow*, of counsel), for appellant.

Govnor Teats, *Hugo Metzler*, *Leo Teats*, and *Ralph Teats*, for respondent.

FULLERTON, J.—In the month of July, 1910, the appellant owned and operated a rock quarry situated on Waldron Island, in Puget Sound. The rock was quarried by blasting,

¹Reported in 116 Pac. 457.

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and when so quarried was carried by means of flat cars from the face of the quarry to a wharf from whence it was taken to its point of destination. The respondent was an employee of the appellant and worked with the crew which loaded and unloaded the cars. For use in loading, a steam crane was used, which had a maximum capacity of about ten tons. Rocks heavier than this maximum weight were frequently thrown down from the face of the quarry, and in order to handle them it was necessary to break them into smaller pieces by blasting. One such rock had fallen near the railway track and was drilled and charged with powder while the respondent was at the wharf unloading cars. On the return of the cars, the respondent proceeded with his helpers and the use of the crane to again load the cars, and was in the act of fastening a chain around a rock near the one which had been charged for blasting when the charge therein was fired. The respondent was struck by a piece of rock torn loose by the explosion, and received injuries for which he sues in this action. The jury returned a verdict in his favor in the court below, and this appeal was taken from the judgment entered thereon. In his complaint the respondent alleged negligence on the part of the appellant in that it failed to warn him of the impending blast and thus give him an opportunity to get into a place of safety before its discharge. The appellant, in its answer, put in issue this allegation of the complaint and pleaded affirmatively to the effect that the negligence causing the injury to the respondent, if any such there was, was the negligence of a fellow servant, and that the respondent was guilty of contributory negligence.

On this appeal three principal errors are assigned: first, that the evidence was insufficient to justify the finding of the jury to the effect that no warning was given the respondent of the impending blast; second, that the court erred in refusing to hold, as a matter of law, that the person discharging the blast was a fellow servant of the respondent; and

third, that the court erred in excluding evidence tendered by the appellant to sustain its allegation of contributory negligence.

The first question suggested was clearly one for the jury. The record does show, indeed, that the greater number of the witnesses who were present at the time of the accident testified that warning of the impending blast was given and that the respondent gave no heed thereto, yet the respondent himself, who was but a few feet distant from the person whose duty it was to give the warning, and still another person but little farther away who likewise remained in an exposed position for want of a warning, testified that no warning at all was given. The question presented, therefore, is one of conflicting evidence, and not one of want of evidence, and being such, it was one within the province of the jury to determine, and their finding thereon is conclusive in the appellate court.

The second contention is also without merit. Since the master suffered the dangerous work of blasting to be carried on by one body of its servants while others thereof were engaged in different work in the zone of danger, it owed the latter the positive duty of warning them of each impending blast, and failure to give such warning rendered it liable for any injury incurred thereby. *Ongaro v. Twohy*, 49 Wash. 93, 94 Pac. 916.

On the trial of the cause the respondent was asked on cross-examination whether he had not failed to get under cover on several previous occasions when blasts were fired, after being warned that a blast was impending, and whether the general superintendent of the works, his immediate overseer, and two different timekeepers had not severally warned him that he was exposing himself to unnecessary danger and would get hurt unless he was more careful, to all of which questions he answered in the negative. Later on the appellant called its general superintendent and proceeded to interrogate him concerning the respondent's habits when blasts were fired near him; asking him whether the respondent had not grown care-

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less with reference to the blasts in that he did not get under cover after being warned that a blast was about to be fired, and whether he had not warned the respondent of his danger and cautioned him to be more careful of his personal safety. To these questions an objection was interposed which was sustained by the court. The appellant thereupon offered to prove by the witness the facts implied by the questions, which offer was also rejected by the court.

In these rulings we think the trial court erred. The evidence was competent on the issue of contributory negligence set up in the answer, and to controvert the evidence of the respondent to the effect that no warning was given of the blast that caused his injury. If the respondent had on different occasions theretofore remained in an exposed position while a blast was being fired, after having received warning thereof, it afforded some ground for belief that such might have been his conduct on this occasion; especially since the greater number of the witnesses to the transaction testified that a warning of the impending blast was given, and that they heard the warning in time to get under cover therefrom, although much farther away from the rock which was being blasted than was the respondent. The respondent cannot recover on the theory that he did not hear the warning. If the usual and customary warning was given, that fact absolves the master. It was the respondent's duty to listen for the warning, since he must know that it was liable to be given at any time. If a warning was in fact given, and if by his own neglect or by chance he did not hear it, the fault is his own and the master cannot be charged with his injuries. Since, therefore, this was a disputed question of fact, the appellant had the right to resort to all of the proofs that tended to support its theory of the case.

It is said, however, that the appellant made the respondent his own witness by asking him these questions on cross-examination, and is bound by his answers. But such is not the

rule. While a party who calls a witness cannot be heard to impeach him by calling witnesses to his truth and veracity, such party may introduce evidence contrary to the matters testified to by the witness and leave it for the jury to say wherein the truth lies. If such were not the rule a party to a lawsuit would be at the mercy of a designing witness.

It is said, also, that the appellant offered the testimony solely for the purpose of impeaching the respondent, and that for such purpose it was not admissible. But an examination of the record will show that the appellant insisted that it was not only admissible for this purpose, but for the purpose of supporting its contention that warning was in fact given.

The cases of *Christensen v. Union Trunk Line*, 6 Wash. 75, 32 Pac. 1018, and *Atherton v. Tacoma R. & Power Co.*, 30 Wash. 395, 71 Pac. 39, do not sustain the ruling of the trial court. In the case at bar the previous acts of negligence sought to be shown were those of the principal himself, while in the cases cited it was sought to bind the principal by showing previous negligent acts of like kind on the part of the servants of the principal which may or may not have been known to the principal. Evidence of prior negligent acts of the principal himself are admissible on the issue of want of ordinary care.

For the error noted, the judgment appealed from is reversed, and a new trial awarded.

GOSE, PARKER, and MOUNT, JJ., concur.

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[No. 9433. Department Two. June 27, 1911.]

COLUMBIA COLLEGE OF MUSIC AND SCHOOL OF DRAMATIC
ART, *Appellant*, v. KARL E. TUNBERG, *Respondent*.¹

INJUNCTION—BREACH OF CONTRACT—PERSONAL SERVICES—ENGAGING IN OTHER EMPLOYMENT. Breach of a contract to give defendant's personal services in a school of music for a term of years will not be enjoined where the services were not so special or extraordinary that they could not be supplied elsewhere, and another teacher was found to take defendant's place without materially impairing the efficiency of the school.

SAME—CONTRACT FOR GOOD WILL. Where a teacher of music was employed to teach in a school for a specified term and agreed not to teach elsewhere and to devote his best efforts to promoting the school, he will be enjoined from soliciting clients of the school and invading its good will during the term, upon his leaving the school and setting up business for himself.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered October 26, 1910, upon granting a nonsuit, dismissing an action for an injunction. Reversed.

George Olson (Edward Judd, of counsel), for appellant.

Roney & Loveless, for respondent.

CHADWICK, J.—Respondent was employed by appellant to teach music in its school at Seattle, for a term of two years beginning September 1, 1909. In consideration of fifty per cent of all individual tuitions, respondent agreed:

"To give his entire time and attention, and devote his best efforts as may be required during the life of this contract, in giving instructions to such pupils as shall be assigned by the Columbia College of Music & School of Dramatic Art, to said party of the second part. The said party of the second part agrees to devote his best efforts in promoting the interest of the said Columbia College of Music & School of Dramatic Art, and to give his services in public on any occasion when the best interests of the said college may demand."

¹Reported in 116 Pac. 280.

It was also agreed:

"That the said party of the second part shall not engage himself unto nor connect himself with any other musical organization requiring pupils unless they become enrolled as regular students of said Columbia College of Music & School of Dramatic Art, and will not teach in the city of Seattle save and except in the said college during the life of this contract."

Respondent entered upon the performance of his contract and so continued until August 1, 1910, when he resigned and refused to longer fulfill his obligations. It appears that, after respondent had begun his work, appellant changed the form of some of its contracts so that, instead of charging a fixed sum for a lesson, it obligated itself to give lessons for a year or a fractional part of a year for a stipulated sum. Respondent claims that, at the time of severing his relations with appellant, he had not been paid all that was his due on these contracts, and it is admitted that \$23 would have been due him upon an accounting. At the same time he had overdrawn his account \$179. Another teacher was employed to take his place, and so far as the testimony shows, the efficiency of the appellant's teaching force was not materially impaired. Respondent set up a studio, and has solicited business from the clients and pupils of appellant.

While the case below went off on a nonsuit, there is enough in the record to indicate that respondent claims that money due on these annual contracts had been dishonestly withheld, and it was for that reason he broke his contract. It does not appear that any proper demand was ever made for an accounting, or that any offer was made to pay the balance due appellant. We shall not pursue this inquiry, for although we are of opinion that respondent erroneously believed that he was bound to justify his act by reference to some supposed wrong, we find the law to be that he might have quit his employment without excuse and without subjecting himself to an action for damages. No damages are claimed in this

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action, but appellant has asked for an injunction restraining respondent from teaching or from giving lessons upon the piano in the city of Seattle, from the time the action was instituted until the 1st day of September, 1911, and for general relief. The rule is well settled that a court will not enjoin the breach of a contract for personal services, unless it is alleged and proven that the services of the contracting party are special, unique, or extraordinary, or the services are of such a character that they cannot be supplied elsewhere with reasonable effort, or the act is such that it cannot be done by another. 22 Cyc. 857, and citations thereunder; *Universal Talking Machine Co. v. English*, 34 Misc. 342, 69 N. Y. Supp. 813; *Rogers Mfg. Co. v. Rogers*, 58 Conn. 356, 20 Atl. 467, 18 Am. St. 278, 7 L. R. A. 779; *Cort v. Lassard*, 18 Ore. 221, 22 Pac. 1054, 17 Am. St. 726, 6 L. R. A. 653; *Taylor Iron & Steel Co. v. Nichols*, 70 N. J. Eq. 541, 61 Atl. 946, 65 Atl. 695; *Sternberg v. O'Brien*, 48 N. J. Eq. 370, 22 Atl. 348; *Carter v. Ferguson*, 36 N. Y. St. Rep. 1, 12 N. Y. Supp. 580; *Strobridge Lith. Co. v. Crane*, 35 N. Y. St. Rep. 473, 12 N. Y. Supp. 898; *Johnston Co. v. Hunt*, 66 Hun 504, 21 N. Y. Supp. 314; *Kessler & Co. v. Chappelle*, 73 App. Div. 447, 77 N. Y. Supp. 285; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 106, 94 N. W. 78; *Gossard Co. v. Crosby*, 132 Iowa 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115; *Simms v. Burnette*, 55 Fla. 702, 46 South. 90, 16 L. R. A. (N. S.) 389; *Philadelphia Ball Club v. Lajoie*, 202 Pa. 210, 51 Atl. 973, 90 Am. St. 627, 58 L. R. A. 227; *Duff v. Russell*, 133 N. Y. 678, 31 N. E. 622.

Upon oral argument this rule is admitted, but it is contended that, although respondent might sever his relations with appellant and leave it remediless to compel his future service or to restrain his employment by another, yet his conduct has been such as to bring him within the rule of those cases which hold that one who covenants that he will not engage in a particular business for a certain limited time for a consideration may be enjoined if he breach his contract.

These cases usually arise where an established business has been sold, the seller's agreement to remain out of the trade for a time being a part consideration for the sale. *Andrews v. Kingsbury*, 212 Ill. 97, 72 N. E. 11; *Spier v. Lambdin*, 45 Ga. 319; *Brown v. Kling*, 101 Cal. 295, 35 Pac. 995; *Downing v. Lewis*, 56 Neb. 386, 76 N. W. 900; *Gordon v. Mansfield*, 84 Mo. App. 367; *Boiley v. Collins*, 59 N. H. 459; *Carter v. Alling*, 43 Fed. 208; *McCaull v. Braham*, 16 Fed. 37; *Hayes v. Willio*, 11 Abb. Pr. (N. S.) 167; *Daly v. Smith*, 49 How. Pr. 150; *Hursen v. Gavin*, 162 Ill. 377, 44 N. E. 735; *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119; *Angier v. Webber*, 14 Allen 211; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. 480; *Carll v. Snyder* (N. J.), 26 Atl. 977; *Genelin v. Reisel*, 10 N. J. L. J. 208; *Stofflet v. Stofflet*, 160 Pa. St. 529, 28 Atl. 857; *Eckart v. Gerlach*, 12 Phila. 530; *Carroll v. Hickes*, 10 Phila. 308.

These authorities run upon the theory that one who has sold a business, agreeing to remain out of a like line for a definite time, cannot destroy the good will with which he has agreed that he will not interfere. It is clear to us that, although respondent cannot be enjoined from giving piano lessons in the city of Seattle, it appearing that he is not possessed of unusual skill or craft in his profession, or that his name is of particular benefit to the appellant, and his place being supplied by another, yet he has nevertheless so conducted himself as to warrant the exercise of the restraining influence of a court of equity. He can seek his livelihood by following his profession or business, and no court will interfere; but under the terms of his contract, he has engaged to promote the good will of appellant's business for a definite time, and he cannot solicit those known to be the clients of appellant or, for the mere sake of advancing his own interest, charge dishonorable or disreputable methods to appellant. He can build up his own business by legitimate methods, but he cannot destroy the business of his former employer by

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methods that do not appeal to that sense of fairness common among men.

The motion for nonsuit, in so far as it goes to the point under discussion, was based upon the ground that it had not been shown that any pupils had left the appellant's school on account of respondent's leaving its employ. We grant that the record fails to disclose this fact. But it does disclose an ill will, as well as an endeavor to influence the minds of certain of the pupils against appellant and its officers. And respondent should not be allowed to claim that immunity which equity gives to those who walk within its precepts, because his effort and his influence failed of results. His continued effort may succeed. To prevent wrong is the peculiar province of equity. His conduct has been such, and promises to be of such character, that damages may result. If so, they would be irreparable, in the sense that they could be estimated only by conjecture and not by any accurate standard. *Commonwealth v. Pittsburgh etc. R. Co.*, 24 Pa. 159, 62 Am. Dec. 372.

A review of the authorities relied on would be engaging to the writer and of possible interest to the profession, but would unnecessarily extend the limits of this opinion. For it is our judgment that appellant's rights depend, not so much on the simple breach of the positive covenants of its contract, as upon the general equitable doctrine that a person who has engaged to support the good will of a business will not be permitted to destroy it by unfair methods. To the observance of this duty respondent bound himself for the whole term, and while he may relieve himself of his negative covenant, he is still bound to maintain, to the extent of inaction at least, the good will of the appellant's business. That injunctions will issue within the facts of the particular case, as for instance if there be unusual talent, knowledge of trade secrets, business methods, and express covenants to maintain the good will of a business, or the good faith of a transaction, finds abundant support in the authorities.

Our conclusion is that appellant has made out a case, and

unless upon a retrial respondent makes a showing that will exonerate him, an injunction should issue restraining him from invading the good will of appellant's business and from soliciting its clients and patrons.

Reversed, and remanded for further proceedings.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9382. Department Two. June 28, 1911.]

S. M. LOCKERBY, *as Administrator etc., Appellant*, v.

W. R. AMON *et al., Respondents*.¹

VENDOR AND PURCHASER—CONTRACT—RESTRICTIONS AGAINST ASSIGNMENT—VALIDITY. A provision in a contract for the sale of real estate that the contract shall not be assigned without the consent of the vendors contravenes no rule of public policy and is enforceable; and other clauses in the contract referring to "assignees" will be taken to mean assignees consented to by the vendors.

Appeal from a judgment of the superior court for Benton county, Yahey, J., entered October 6, 1910, upon granting a nonsuit, dismissing an action for specific performance. Affirmed.

Anderson & Marshall, C. L. Holcomb, and Edward H. Wright, for appellant.

Humphrey & Cole, Moulton & Henderson, and Henry J. Snively, for respondents.

CHADWICK, J.—Defendants entered into a written contract with one F. A. Swingle, whereby they agreed to sell Swingle certain real property in consideration of the sum of \$1,600. One dollar was paid down, and the remainder was to be paid on or before two years after the date of the con-

¹Reported in 116 Pac. 463.

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tract, with interest at the rate of eight per cent per annum. The contract provided that:

"The said parties of the first part will sell to the said party of the second part, his heirs and assigns, . . . In case said party of the second part, his legal representatives or assigns shall pay the several sums of money aforesaid punctually at the several times above specified, and shall strictly and literally perform all and singular the agreements and stipulations aforesaid, according to the true intent and tenor thereof, then the said parties of the first part shall make to the said second party, his heirs or assigns, upon request and upon the surrender of this agreement, a warranty deed to said premises."

It was further provided: "And it is further agreed that no assignment of this agreement shall be valid without the consent and signature of W. R. Amon and Sarah M. Amon, his wife, the parties of the first part." The contract was afterwards assigned by Swingle and wife to Herbert E. Johnson, plaintiff's intestate, who tendered the full amount due under the contract, and demanded a deed. This being refused, he brought this action to compel specific performance. At the conclusion of plaintiff's case, a judgment of dismissal was entered, upon the ground that the contract was not assignable.

It is not denied that stipulations of the character relied on in this case are lawful and binding upon the parties. *Hunter Tract Imp. Co. v. Stone*, 58 Wash. 661, 109 Pac. 112. However, an engaging argument is made by appellant upon the theory that, although the parties had a right to so contract, the restrictive clause has performed its office; that is, it being designed only to insure payment of the purchase price, and that being tendered, there can be no reason for withholding the deed; and generally that, inasmuch as Swingle might have tendered and received a deed, and thereafter immediately conveyed to Johnson, equity—inasmuch as it regards substance rather than form—will compel the execution of a deed to the assignee. These arguments are not new, and find some sup-

port in the authorities; but they have been rejected by a majority of the courts. The privilege of selecting a grantee is an incident of ownership, and we cannot presume, as did the supreme court of Minnesota, that "at most this stipulation against an assignment is merely collateral to the main purpose of the contract, designed as a means of securing and enforcing payment of what was undertaken by the vendor, to wit, the prompt payment of the purchase money. When the vendor has received all his purchase money, he has received all that he is entitled to, and all that the provision against the assignment was intended to secure." *Johnson v. Eklund*, 72 Minn. 195, 75 N. W. 14.

While this reasoning is entitled to consideration, we cannot accept it as the end of the law. A vendor may have confidence that his vendee will not use the property to his disadvantage. It is his privilege to decline to deal with strangers. Or he may, by limiting the right of assignment, save any question as to the interest of intervening third parties, a result not altogether unlikely under our community property system. Or he may be unwilling to assume to pass upon the legal sufficiency of an assignment. The better rule is stated in *Omaha v. Standard Oil Co.*, 55 Neb. 337, 75 N. W. 859, wherein it is said:

"It compelled the city to deal with strangers and to determine at its peril which of the contesting claimants was entitled to the fund. This may have been one of the very contingencies contemplated by the city, and against which it sought to provide by making the contract nonassignable. Another object in view might have been to prevent the company from losing interest in the performance of the contract by divesting itself of all beneficial interests therein. But it is needless for us to speculate on the motives for the city's action. It is enough for us to know—whatever its reasons may have been—that it has, in plain language, stipulated, against the assignment of the contract. That stipulation is valid and must be enforced."

See, also, Monographic Notes, 88 Am. St. 201 (*Mueller v. Northwestern University*, 195 Ill. 236, 63 N. E. 110); 4 Cyc.

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Syllabus.

20. And, although it is rightly contended that the case of *Bonds-Foster Lumber Co. v. Northern Pac. R. Co.*, 53 Wash. 302, 101 Pac. 877, turned upon a statute, we were influenced in our construction of the statute by reference to the general rule that:

“One who accepts an assignment of a contract which by express terms is made nonassignable, acquires only a cause of action against the assignor.”

See, also, *Behrens v. Cloudy*, 50 Wash. 400, 97 Pac. 450.

Whatever may have been the reasons for reserving the right to decline to deal with an assignee, such reservation contravenes no rule of public policy, and is enforceable. We attach no importance to the clauses of the contract in which the word “assignee” is used. They will be construed in the light of the whole contract, and when so regarded, must be taken to mean such assignees as the vendor is willing to accept.

Judgment affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9524. Department Two. July 1, 1911.]

CHARLES SWANSON, *Appellant*, v. A. A. GORDON *et al.*,
Respondents.¹

MASTER AND SERVANT—FELLOW SERVANTS—ACT OF FOREMAN ASSISTING IN WORK. The negligence of a working foreman of a gang of structural iron workers, engaged in raising a boom stick to the mast of a hoist derrick, is not imputable to the master, where they were all experienced men, the act was simple and there was no hidden danger, it was not customary to furnish an extra man to oversee the work, and the accident happened through the oversight of the foreman in pulling the stick a few inches higher than the proper place; since it was an omission of fellow service rather than lack of superintendence.

¹Reported in 116 Pac. 470.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 10, 1910, upon granting a nonsuit, dismissing an action for personal injuries sustained by an employee engaged in constructing a building. Affirmed.

Owens & Finck and Reynolds, Ballinger & Hutson, for appellant.

Roberts, Battle, Hulbert & Tennant, for respondents.

CHADWICK, J.—Plaintiff and four others, all structural iron workers, were engaged in one gang on the Northern Bank building in the city of Seattle. One Norman was the gang foreman, and directed the work. He is called also a working foreman, or working boss, by some of the witnesses. He gave a hand when necessary. In the promotion of the work at hand, it became necessary to lash a mast onto a hoist derrick, so as to extend its sweep. The derrick was twenty feet eight inches high, and the straight legs were tied by two rungs and a top piece. The mast was a six-by-eight stick of timber, seventeen feet long. In order to put it in the proper place, it became necessary to lift it so that it might be lashed to the first or top rung of the derrick. Accordingly two blocks with necessary tackle were put in place, the top or fixed block so arranged as to make a draw of five or six feet. Norman, the working foreman, and another workman pulled the tackle until the blocks came together, and plaintiff, who was on the top of the derrick, and two other workmen, stationed on the first and second rungs, held the timber in place while the workman on the first rung kicked the lashings down so that a new hoist could be made. It was the intention of the parties to bring the bottom of the mast up to within three or four inches of the top rung, where it was to be securely lashed, so that it might be made to perform its function. The work had progressed until the end of the mast was within a foot of the top rung. Another hoist was made, and instead of stopping the mast so that the lower end was

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about three inches below the top rung as was intended, Norman and the one who was helping him pulled the mast an inch or two above the top rung, when, being no longer supported by the rung and plaintiff being unable to hold it, the mast toppled over and carried the plaintiff, who was kneeling with his left knee on the cross-piece, his right leg hooked around one of the side pieces, his right hand holding on the derrick, and his left arm about the mast, off of his balance so that he fell to the floor, sustaining the injuries of which he now complains.

The work and the relations of the men may be best illustrated by reference to the record. One of the workmen says:

“Q. There was nothing at all complicated about this? A. No, sir; not at all; just as straight as you have it there. Q. Just a simple proposition? A. Yes, sir. Q. And there was nothing about it that you could not see or Swanson could not see as well as Mr. Norman could see it or Mr. Gordon or Mr. White, anybody would see it? A. Yes, sir; just as straight as you have it there before you, gentlemen. Q. Nothing concealed? A. No, sir. Q. Or complicated about it? A. Not a thing.”

Norman, the foreman, who was a witness for plaintiff, says:

“Q. There was nothing in the process of elevating this stick but what was plain, could be seen by anybody? A. Just pulled it up. Q. Just pulled it up? A. Yes, sir. Q. And it was a simple thing to do, anybody could do it? A. Anybody could do it, but we did not do it; lots of things look simple but anybody cannot do it. Q. There was nothing about it that Mr. Swanson could not see just as well as you could see it? A. Yes, sir; he could see. Q. Nothing about it that he could not see just as well as Mr. Gordon could have seen it if he had been there? A. Yes, sir; they all could see it. Q. They all could see it? A. Yes, sir. Q. And you men were all of you iron workers? A. Yes, sir. Q. All members of the same order? A. Yes, sir. Q. And therefore, there was no disposition on your part to hurt anybody else, was there? A. No, sir. Q. So that this was really an accident that happened there among you, wasn't it? A. It was just

an oversight on my part in pulling it too high. Q. An oversight in pulling it too high on your part? A. Yes."

While the plaintiff testified:

"Q. Now, these five men were all experienced men, were they not? A. Yes, sir. Q. They were all experienced in this structural iron work? A. Yes, sir. Q. As a matter of fact, Mr. Swanson, it was a good gang, wasn't it? A. Yes, sir. Q. All good men? A. Yes, sir. Q. Now the work of arranging this derrick there was merely a preliminary to putting up the big derrick? A. Yes, sir. Q. This derrick which is called the breast derrick was simply being put up in order to install this boom derrick that you used to handle the steel? A. Yes, sir. Q. And the breast derrick was not used in handling the steel, was it? A. Well, while assisting after—Q. It might assist afterwards? A. Yes, sir. Q. But what you were doing at the time in putting up the boom derrick was a mere incident in the real work of putting up the steel, wasn't it? A. Yes, sir. . . . Q. Now, when you went up there, you selected your position on the derrick. A. Yes, sir."

At the close of plaintiff's case, a judgment of dismissal was entered by the trial judge, who entertained the opinion that there was no actionable negligence on the part of defendants.

The charge of negligence in this case is that the foreman, in directing the operation of the derrick and movements of the men, was negligent in that he allowed the mast to be pulled too far so that it toppled over. There is no allegation, nor is there any showing, of other negligence. On the other hand, it is shown by all of the witnesses, that the appliances were ample and sufficient and in good condition; that the men were competent and skillful workmen; that there was no negligence in the selection, or an insufficient number, of men; and that the foreman was in no way incompetent. The case is reduced to the single proposition, whether the oversight of a foreman, who was one of a gang and working with it, and who failed to stop pulling on a rope attached to the mast in time to prevent the accident, is imputable to the master.

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Appellant puts his principal reliance upon the following cases: *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Tills v. Great Northern R. Co.*, 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434, and the cases cited in *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034, a case to which we shall hereafter refer. It has never been held that, because two or more men are engaged in a like undertaking, the duty of superintendence follows as a legal obligation. To put the mere details of a work under the burden of independent superintendence would necessitate the employment of one man to oversee every other, no matter what the character of the work. It is generally held that the question of the right of superintendence is to be resolved by reference to the facts of the given case. *Engelking v. Spokane*, 59 Wash. 446, 110 Pac. 25, 29 L. R. A. (N. S.) 481.

We cannot presume that independent superintendence would have prevented the careless and negligent act of plaintiff's fellow workman; or as he himself styles it, his oversight. A mast may be pulled an inch too far, a pole tipped an inch out of balance, the wall of a ditch may be dug without sufficient batter by one workman, and another may be injured, and yet the master may have done all that could reasonably be required of him. So in this case, with five competent and experienced men, with every appliance necessary, and these in perfect order, with no showing that it was customary to furnish an extra man to oversee such work, with no hidden danger or defect, the work, considering the employment and skill of the workmen, not in itself dangerous, and a plaintiff who had himself been foreman on like jobs, knowing that the one whose carelessness is attributed to the master was a fellow workman with him, it would seem that the defendants had done their whole duty. The workmen were employed in a common service. The accident occurred because of an omission of fellow service, and not from lack of superintend-

ence. Without reviewing the cases relied on, it will be seen by reference that each of them turned on the fact that the character of the work was such that general oversight by an independent agency could not be dispensed with without depriving the injured servant of a substantial right. This case falls squarely within the case of *Desjardins v. St. Paul & Tacoma Lumber Co.*, *supra*, where the court said:

"It was claimed by respondent at the trial, and is also claimed here, that Mr. Brandt was a vice principal, and that he was negligent in not warning respondent that the post was about to fall, and also negligent in placing the sling near the bottom of the post instead of near the top. It is claimed by the appellant that the evidence shows Mr. Brandt was not a foreman and had no more authority over respondent than respondent had over Mr. Brandt, in other words, that Mr. Brandt and respondent were simply fellow servants working together, with no authority the one over the other. We may assume, however, for the purposes of this case that Mr. Brandt was a foreman for the purpose of directing the work, and therefore had control of the respondent. Still, the respondent's evidence makes it plain that the negligence which caused the injury was the negligence of a fellow servant in a mere detail of the work. It is not claimed that the proper appliances were not furnished by the master. Respondent states that: 'Brandt held the post and I thought he was going to hold it, and I did not suppose he would let it go. . . . I just happened to look up and see Brandt had let go of the post and had his hand here on the rope close to the tackle. . . . A ten-year-old boy could hold the post if he would not let go.' In holding the post Mr. Brandt was performing a mere detail of the work. He was not performing any non-delegable duty of the master. If he was negligent in letting go of the post with his hands and attempting to hold it by the tackle, the negligence in that respect was clearly the negligence of a fellow servant for which the master was not responsible. This case in this respect is controlled by the case of *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405. The respondent relies upon the rule stated in *Nelson v. Willey S. S. & Nav. Co.*, 26 Wash. 548, 67 Pac. 237; *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lumber Co.*, 40

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Wash. 276, 82 Pac. 273, and other cases holding that, where the master directs a dangerous agency into motion without warning, and injury results to the servant, the master is liable. That rule cannot apply to this case because, if Brandt represented the master, he directed no dangerous agency into action. He was holding a post with his hands. A ten-year-old boy could have held it. He took his hands from the post and attempted to hold it by means of a rope. The post fell without his volition, so far as the evidence shows. If that was negligence, it was his own negligence and not that of the master."

In that case the foreman removed his hands from the post which he was setting in an upright position, and it toppled over and fell. In this case the foreman pulled the mast a few inches beyond its proper place, and it toppled over, carrying the appellant with it. It was clearly an omission of fellow service, and plaintiff cannot recover. *Cavelin v. Stone & Webster Eng. Corp.*, 61 Wash. 375, 112 Pac. 349; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389.

Judgment affirmed.

MORRIS, CROW, MOUNT, and ELLIS, JJ., concur.

[No. 9388. Department Two. July 3, 1911.]

MARION J. BELL, *Respondent*, v. OLE ENGVOLSEN *et al.*,
Appellants.¹

MORTGAGES—CONSTRUCTION—INTEREST—TIME FOR PAYMENT—DEFAULT. There being no conflict between a mortgage note calling for interest at a certain rate per annum, and a stipulation in the mortgage requiring payment of interest semi-annually, according to the terms of the note, the two are to be construed together as intending semi-annual payments, and hence failure to pay interest semi-annually constitutes a default within the provisions of the mortgage authorizing foreclosure thereon.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered June 15, 1910, upon findings in

¹Reported in 116 Pac. 456.

favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage. Affirmed.

William B. Ritchie, for appellants.

W. Brumfield and *J. E. Cochran*, for respondent.

CHADWICK, J.—This is an appeal from a decree foreclosing a mortgage given to secure a promissory note, whereby appellants promised to pay to respondent, three years after date, \$3,100, “with interest at the rate of ten per cent per annum until paid.” It is provided in the mortgage:

“This conveyance is intended as a mortgage to secure the payment of three thousand one hundred dollars, gold coin of the United States, together with interest thereon in like gold coin at the rate of ten per cent per annum from date until paid, payable semi-annually, according to the terms and conditions of one certain promissory note bearing even date herewith, made by first parties, payable three years after date to the order of second party. And these presents shall be void if such payment be made according to the terms and conditions thereof. But in case default be made in the payment of the principal or interest of said promissory note, or any part thereof, when the same shall become due and payable, according to the terms and conditions thereof, then the said party of the second part, his executors, administrators and assigns, are hereby empowered to sell the said premises, with all and every of the appurtenances or any part thereof, in the manner prescribed by law, and out of the money arising from such sale, to retain the whole of said principal and interest whether the same shall be then due or not, together with the cost and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale, on demand, to the said parties of the first part, their heirs or assigns.”

It is contended that, inasmuch as the note does not provide for the payment of interest until the due date, the stipulations contained in the mortgage cannot be held to enlarge its terms. We find the rule to be as declared by the trial judge.

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When a note is made and a contemporaneous writing is executed to secure or qualify it, the two instruments, when not conflicting, will be construed together so that effect may be given to both. The purpose of the court is to gather the intent of the parties, not from the one writing, but from all of them. *Dobbins v. Parker*, 46 Iowa 357, is quite on all fours with the case at bar:

“The notes and mortgage bear the same date, and are to be construed together. There is no real conflict between the notes providing for ten per cent interest per annum from date, and the mortgage providing for interest at the rate of ten per cent per annum payable annually. If the notes had expressly provided that the interest should be payable annually, and the mortgage had provided that the interest should be payable semi-annually, there would have been a case of real conflict. But in this case the mortgage specifically provides for something respecting which the notes are silent, and the provisions of the mortgage might be incorporated into the notes without creating any inconsistency. The notes would then read ‘with ten per cent interest per annum from date payable annually.’ It is claimed, however, that the words ‘according to the tenor of four promissory notes of said Francis Parker, of even date herewith,’ show that the intention was to pay simple interest at the rate of ten per cent per annum as provided in the notes. This construction would entirely ignore the word ‘annually.’ Agreements must be so construed, if possible, as to give effect to all the terms employed. Tenor does not mean the exact language, but the purport, substance, general course or drift. The mortgage, then, provides for payment of the notes according to their purport and substance. This is not necessarily inconsistent with the idea that the interest on the notes should be paid annually.”

See, also, *Muzzy v. Knight*, 8 Kan. 456; *Meyer v. Graeber*, 19 Kan. 165; *Hennessy v. Gore*, 35 Ill. App. 594; *Brownlee v. Arnold*, 60 Mo. 79; *Seieroe v. First Nat. Bank*, 50 Neb. 612, 70 N. W. 220; *Prichard v. Miller & Co.*, 86 Ala. 500, 5 South. 784; 17 Am. & Eng. Ency. Law (2d ed.), 11; 27 Cyc. 1135; Daniel, Negotiable Instruments (5th ed.), § 156;

Jones, Mortgages (5th ed.), § 71. There being no conflict in the terms of the two writings, and the intention of the parties to pay interest semi-annually being manifest, the whole debt, by reason of this default, became due, and the decree was properly entered.

Affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9238. Department Two. July 3, 1911.]

THOMAS T. KOBAYASHI, *Respondent*, v. L. I. STRANGWAY,
Appellant.¹

ANIMALS—PARTITION FENCES—TRESPASS. At common law a tenant was not bound to fence against the cattle of his neighbor, who was answerable for any trespass committed.

ANIMALS — BOUNDARY AND PARTITION FENCES — TRESPASS. The fence law, Rem. & Bal. Code, § 4977 *et seq.*, recognizing boundary and division fences, the latter to be jointly erected and maintained, requires an owner of inclosed lands to fence only against stock lawfully at large, and not against stock in an adjoining inclosed field; and where the owner of stock in his own inclosure does not avail himself of the statutory provisions for the maintenance of a division fence, the common law rule applies, and he is liable for trespass by reason of the failure of the division fence to restrain his stock.

SAME—FENCES—STATUTORY PROVISIONS—CONSTRUCTION. The intent of the fence act of 1863, construed with reference to conditions then existing, was to require fencing against stock at large on the public domain, and not to change the common law rule as to fences dividing inclosed fields when not erected pursuant to the statute governing division fences.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered May 24, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for trespass. Affirmed.

¹Reported in 116 Pac. 461.

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Opinion Per CROW, J.

Lee C. Delle, for appellant.*Holden & Wheeler* and *F. A. Hatfield*, for respondent.

CROW, J.—Action by Thomas Kobayashi against L. I. Strangeway, to recover damages sustained by reason of defendant's cattle trespassing upon plaintiff's land and destroying his crops. The plaintiff alleged, that in the year 1909 he held as lessee certain lands in Yakima county upon which he was raising a crop of celery and onions; that about October 15, 1909, the defendant obtained a lease of adjoining lands for pasture; that both tracts were inclosed, but separated by a partition fence composed of widely separated posts, loosely set, and of light wire easily broken, insufficient to turn range cattle; that on October 15, 1909, the defendant turned about seventy-five head of range cattle onto his land; that on that date, and repeatedly thereafter until December, 1909, they broke through the partition fence at divers times and places, trespassed upon plaintiff's land, and destroyed his celery plants and onions, to his damage in the sum of \$1,300; that the cattle were turned into defendant's inclosure without plaintiff's knowledge or consent, and while plaintiff was absent from Yakima county, and that defendant caused the partition fence to be repaired, but so carelessly and negligently as to leave it, to his knowledge, in a condition unfit to turn cattle. To this complaint a general demurrer was overruled. Thereupon the defendant answered, and upon trial a verdict for \$950 was returned in plaintiff's favor, upon which judgment was entered. The defendant has appealed.

Appellant's first assignment is that the trial court erred in overruling his demurrer. The points raised by the demurrer were not affected by the evidence subsequently introduced, and the sufficiency of the complaint is properly before us for consideration. The substance of appellant's contention is that its allegations describing the partition fence failed to show it was a lawful fence under any section

of our fence law (Rem. & Bal. Code, title 31, § 4977 *et seq.*) ; that the fence law necessarily imposes upon respondent the burden of showing he had a lawful partition fence sufficient to exclude appellant's cattle and prevent them from trespassing upon his lands ; and that, in the absence of allegation and proof of the maintenance of such a fence, he cannot recover. Sections 4977 and 4978 define lawful fences, and it must be conceded that neither by the allegations of his complaint nor by the evidence introduced has the respondent shown the partition fence met the requirements of these sections. Section 4980, referring to boundary fences, provides that, when they become partition fences by reason of an adjoining owner inclosing his lands, he shall pay to the former owner of the fence one-half of its value. Subsequent sections provide a procedure for the erection of partition fences, and payment of their cost by adjoining owners. Two classes of fences seem to be recognized: (1) boundary fences which separate private inclosed lands from public highways, from the public domain, or from uninclosed private lands ; and (2) partition fences which separate private inclosures of adjoining proprietors. At common law a tenant was not obliged to fence his close against his neighbor unless by prescription, and every person was, at his peril, bound to keep his cattle within his own close, being answerable for damages resulting from their trespass upon other lands, whether the latter were inclosed or uninclosed. 2 Cyc. 392.

The question now before us is the extent to which our fencing statutes have abrogated, modified, or supplanted the common law rule. There is no question but that these statutes require the owner of inclosed lands to fence against cattle and stock lawfully at large upon public highways, the public domain, or uninclosed private lands. But do they require an owner of inclosed private lands to provide a partition fence which shall be a lawful fence as defined in §§ 4977 and 4978, *supra*, between his private inclosure and the adjoining private inclosure of his neighbor? In other words, is he

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required to allege and show his maintenance of such a partition fence sufficient to exclude his neighbor's cattle, as a condition precedent to the right to recover damages resulting from their trespass? It is conceded no partition fence has been demanded, constructed, or maintained in the manner provided by the statute. This being true, we conclude the common law rule applies as between the owners of the adjoining inclosures, and that its obligations are imposed upon appellant, requiring him to restrain his cattle on his own land. His cattle were not upon the public highway, the public domain, or any uninclosed private land. On the contrary, they were turned into appellant's inclosure at a time when no lawful partition fence had been constructed or maintained between his inclosure and that of the respondent. In this state, parties owning adjoining inclosures may secure the benefit of lawful partition fences, and apportion their cost, by availing themselves of the procedure announced in the fencing statute. If no lawful partition fence has thus been obtained or maintained, and one of the parties sees fit to turn his cattle into his own inclosure without first availing himself of the benefit of such statutory procedure, he must be held to the common law obligation of keeping his cattle upon his own premises and liable for damages resulting from their trespass upon the inclosure of his neighbor. Under conditions and statutes quite similar, the supreme court of Indiana, in *Myers v. Dodd*, 9 Ind. 290, 68 Am. Dec. 624, said:

"We have a statute concerning enclosures, trespassing animals, and partition fences (1 R. S. p. 292,) the first section of which defines a lawful fence to be such as good husbandmen generally keep. The second section provides that if any domestic animal break into an enclosure, the person injured thereby shall recover the amount of damage done, if it shall appear that the fence through which the animal broke was lawful; but not otherwise. Partition fences are to be equally maintained by both parties. If either party shall fail to contribute his proportion, the other may, upon notice, have the requisite amount assessed; and if upon notice

of the assessment he shall still fail, the other may make the repairs, and recover from him the amount he should have contributed, with 10 per cent damages: 1 R. S. *sup.* §§ 15, 16, 17. Another statute provides that the board of commissioners of each county by an order to be entered upon their records, shall direct what kind of animals shall be allowed to pasture or run at large upon the unenclosed lands or public common, within the bounds of any township in their respective counties: 1 R. S. p. 102. . . The common law rule, in the absence of any statute controlling it, is that the owner of cattle is bound to confine them upon his own lands. *Williams v. New Albany and Salem Railroad Company*, 5 Ind. R. 111; *Lafayette and Indianapolis Railroad Company v. Shriner*, 6 Id. 141; *Page v. Hollingsworth, supra* (2). We think there is no statute controlling the common law rule, so far as this case is concerned. Both parties were equally bound to maintain the partition fence. Either might have repaired it, and enforced contribution from the other; but neither having done so, they stood upon their respective common law rights and obligations. This required Myers to keep his cattle at home. Having violated that rule, he was liable for the trespass committed by them."

See, also, *Baker v. Robbins*, 9 Kan. 303; *De Mers v. Rohan*, 126 Iowa 488, 102 N. W. 413; *O'Riley v. Diss*, 41 Mo. App. 184, 97 Am. Dec. 268; *Harrison v. McClellan*, 64 Misc. Rep. 430, 118 N. Y. Supp. 573.

There is no showing here that either party has at any time seen fit to avail himself of the provisions and procedure of our statutes relative to a lawful partition fence. On the contrary, appellant turned cattle into his own inclosure at the time, knowing it was not separated from respondent's inclosure by any lawful fence sufficient to turn stock. He is in no position to insist that respondent has neglected any statutory duty in the matter of securing a sufficient partition fence. If, for his own protection, respondent would be required to fence at all, he would only be required to fence against cattle running at large upon public highways, the public domain, or uninclosed private lands. If appellant's cattle turned by him into his own inclosure broke

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through an insufficient partition fence and trespassed upon respondent's inclosed lands, appellant must be held liable for all damages thereby resulting to respondent. The inclosing of two tracts of land by one outside or boundary fence is not, under our statute, a license to the owner of either to so dispose of his cattle that they may at will trespass and graze upon the land of the other, within the same general inclosure.

Our fencing statute was originally adopted in 1863 when Washington was a territory. It must be construed with reference to conditions which then prevailed and called it into existence. It is common knowledge that, at the times it was originally enacted and subsequently amended, the territory was sparsely settled; that its public domain was broad and extensive; that private property was less extensive; that public lands were generally used as a vast range for cattle and other stock; that it was more feasible for owners of private property to fence out and exclude cattle pastured upon the public domain, than it was for the owners of such cattle to comply with the common law rule of preventing them from trespassing upon uninclosed private lands. The evident purpose of the statute was, (1) to compel owners of private property to protect their lands by lawful boundary fences against stock and cattle ranging upon the public domain; and (2) to provide that owners of private lands might obtain the mutual benefit of partition fences between their adjoining inclosures at their joint expense, by availing themselves of the procedure of the statute enacted for that purpose. The purpose of this legislation was not to change the common law rule as to the relative duties of adjoining inclosures separated from the public domain by outside or boundary fences, unless they first availed themselves of the procedure and benefits of the statute authorizing them to secure lawful partition fences at their joint expense, for the purpose of separating their private inclosures and protect-

ing the one from the other. The complaint stated a cause of action, and the demurrer was properly overruled.

Appellant further contends the evidence was insufficient to sustain the verdict for the full amount of damages awarded. We have carefully examined all the evidence and conclude it is sufficient to support the verdict. The judgment is affirmed.

DUNBAR, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 9325. Department Two. July 3, 1911.]

MATT STARWICH *et al.*, *Appellants*, v. WASHINGTON CUT GLASS COMPANY, *Respondent*.¹

LANDLORD AND TENANT—RENTS—LEASE—ACCEPTANCE. A lessee is liable for rent upon accepting a lease, although it did not go into possession or sign the lease.

CORPORATIONS—CONTRACTS—ACCEPTANCE OF LEASE—LANDLORD AND TENANT. A corporation accepts a lease and is liable for the rent, where the trustees authorized the officers to enter into it, the lease was delivered to the officers, who accepted it on behalf of the corporation, and directed that rents received from tenants in possession be applied upon the rent reserved in the lease.

CORPORATIONS—OFFICERS—AUTHORITY—EVIDENCE. Authority to the president and secretary of a corporation to enter into a lease may be shown by parol as well as by minutes of the board of trustees, where no minutes were necessary.

SAME—REQUIREMENTS OF BY-LAWS. A formal act of the trustees, required by the by-laws, is not essential to bind the corporation by a lease executed by the officers pursuant to the assent and previous authority of all the trustees, constituting all of the stockholders.

Appeal from a judgment of the superior court for King county, Main, J., entered December 3, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

¹Reported in 116 Pac. 459.

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Opinion Per MORRIS, J.

McBurney & Cummings, H. McC. Billingsley, and C. C. Cutler (Walter S. Fulton, of counsel), for appellants.

William R. Bell, for respondent.

MORRIS, J.—Appeal from a judgment of dismissal in an action to recover for breach of a lease. Appellants were owners of certain premises in Seattle. The respondent company was organized in October, 1907, to engage in the manufacture of cut glass. It desired to obtain suitable quarters for that purpose. Appellants' building was suggested, and negotiations were entered into to obtain same, resulting in an offer from appellants to lease for a term of three years at \$75 per month in advance. This offer was submitted to a meeting of the trustees of the respondent, held on October 21, 1907, and was accepted, providing the building was found suitable for the required purposes. A committee of three was appointed to examine the building. Upon such examination the building was found to be satisfactory, and measurements of it were taken and handed to one of the trustees, who was to purchase necessary machinery in the east. This condition was reported to the president and secretary of the company, who thereupon requested appellants to prepare and submit a form of lease, which was done, and the submitted form being satisfactory to the president and secretary, appellants were requested to formally execute the lease and return it to the officers of the company. This required some time as the appellants were residents of different places. However, about the last of December, 1907, the lease, having been formally executed, was delivered to the president and secretary of the company, who accepted and received the same on behalf of the company. Subsequently demands for rent were made, which were not complied with, the president and secretary asking for time on account of the inability of the company to get things moving as they had anticipated. The lease was not returned to appellants, and they were informed that the same had been mislaid and

could not be found. The president and secretary of the company, however, continually asserted their acceptance of the lease, and their intention to pay the rent as soon as their financial situation would permit.

At the time of the execution of the lease, the premises were partly occupied and paying a small rental. These tenants remained in possession, and the agent of appellants, who had formerly collected the rent, was instructed by the president of the company to continue doing so and apply the proceeds in payment of the rent reserved in the company's lease. This was done. February 20, 1908, the president of the company wrote the vice president and member of the board of trustees, who had gone east to further promote the business of the company, saying, among other things: "We have entered into a lease for the brick building in South Seattle of which you have the measurements, at \$75 per month, from January 1, 1908, from which we are only getting \$20 per month revenue at the present time." The demands for rent continued and became more insistent, when in March the treasurer of the company discovered that the lease had not been signed by the company and, refusing to pay for that reason, negotiations were broken off and this suit followed. Subsequently appellants filed an amended complaint in which they recite a reentry and a reletting of the premises, and seek now to recover the difference between the rent reserved in the lease and the rental value of the premises.

The lower court denied any liability upon the lease, as we gather from the findings, for the reasons, (1) that the lease was not signed by the lessees; (2) that the lease had never been formally submitted to, nor accepted by, the trustees of respondent; (3) that no possession had been taken of the premises, nor other action by the trustees showing a ratification. These are the questions now submitted on the appeal. There were five stockholders in this company, and the five stockholders were elected five trustees. The trustees then elected one of their number president, another vice presi-

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dent, a third secretary, a fourth treasurer; the fifth trustee expected to act as manager when the company commenced active operations. With these determinative facts in mind, we come to the discussion of the legal phases suggested.

It is well established that it is not essential to the validity of a lease that it be signed by the lessee, providing the lessee accepted the lease and acts thereunder, which acceptance is generally shown by taking possession or the payment of rent. Underhill, Landlord and Tenant, § 232; McAdam, Landlord and Tenant, § 47; Tiffany, Landlord and Tenant, § 27. It is also held that the lessee is bound where he accepts the lease, even though his acceptance be not established by possession. *McFarlane v. Williams*, 107 Ill. 33; *Doxey's Estate v. Service*, 30 Ind. App. 174, 65 N. E. 757; *Midland R. Co. v. Fisher*, 125 Ind. 19, 24 N. E. 756, 21 Am. St. 189; *Schmucker v. Sibert*, 18 Kan. 104, 26 Am. Rep. 765; *Guthrie v. Anderson*, 47 Kan. 383. Underhill, Landlord and Tenant, § 242, asserts that, inasmuch as the delivery of a lease may be a benefit to the lessee, there is a presumption of acceptance, and this presumption may be raised by a retention of the lease.

Without committing ourselves to this last doctrine, it is plain to us that there was an acceptance of this lease by the president and secretary of this company. Every act upon which acceptance could be predicated is present, except the formal signing of the lease. They admit their liability for the rent and promise to pay the same. They direct the collection of the rent from the tenants in possession of a portion of the premises, and direct it to be credited upon the rent to be paid by the company. And as the vice president of the company, on account of his absence, is the only officer of the company to whom these facts are not known, the president writes him a letter, giving him the information. This company did not proceed further than its organization and the negotiations concerning this lease. As we have indicated, it was unable to rise above the financial stress of the time of its

organization. It held no meeting subsequent to October 21, 1907. It awaited the result of its vice president's efforts in the east, and when they failed, it gave up the ghost. But that did not deliver it from the burden of its contracts, nor create an excuse upon which it can escape liability upon this lease. Conceding all that its president and secretary have done in the acceptance of this lease, respondent seeks to escape liability in its contention that no meeting of its trustees is shown in which this lease was formally accepted; nor is any action shown on the part of the trustees obligating the company to pay the rent. It is shown, however, that at the meeting of the trustees October 21, the president and secretary were authorized to execute a lease upon the terms then and there suggested. This does not appear in the minutes of that day's meeting. The secretary says, in moving his office about that time, the minutes were lost. It is immaterial whether they were or not. No minutes were necessary to the conferring of such authority, and the acts of the trustees could be shown by parol as well as by the minutes. *Handley v. Stutz*, 139 U. S. 417. A previous authority by the trustees to the president and secretary to execute a lease would be as binding as any subsequent ratification of such an act.

It is again strongly urged that the provisions of the by-laws of the company only permit the company to be bound by the formal act of its trustees. By-laws are for the protection of the stockholders, and act as a restraint to prevent the officers of a corporation from exercising more or greater authority than that conferred. In the case before us the stockholders were all trustees, and all officers, save one. They all took part in what was done. They were not attempting to represent others with or without authority. They represented themselves. The negotiations for the lease were submitted to all of them. They knew its terms and conditions, and authorized its execution. They investigated the building and found it satisfactory. They took meas-

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Syllabus.

urements of the building, and forwarded them to the trustee in the east to aid him in the selecting of suitable machinery. They do not question their liability for rent until it is discovered the lease is not signed. We might add, as is said in *Solomon Solar Salt Co. v. Barber*, 58 Kan. 419, 49 Pac. 524:

“What the rights of dissentient stockholders might be in such case, we need not and do not consider; nor need we consider what the corporation, the legal entity itself, might do in behalf of dissenting stockholders. In this case, there is neither officer nor owner to now dissent from that to which he had not previously given assent.”

The previous assent of these stockholders, acting as trustees, to the negotiations for this lease, and their authority to the president and secretary to execute it, are as binding upon them and the corporation itself as any subsequent ratification could be. *Morawetz, Private Corporations*, § 228; *Union Nat. Bank v. Shoemaker*, 68 Mo. App. 592.

We therefore hold that there was an acceptance of the lease by the respondent, and for that reason, the judgment is reversed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9367. Department Two. July 3, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. E. C. POOLE,
Respondent.¹

CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL—STATUTES — CONSTRUCTION. Rem. & Bal. Code, § 2314, providing for the dismissal of a criminal prosecution by order of court and that no prosecuting attorney shall discontinue or abandon a prosecution except as therein provided, construed in connection with § 2315, providing that a dismissal of a misdemeanor or gross misdemeanor under § 2314 shall bar another prosecution charging the same offense, refers only to dismissals where the expressed purpose of the prosecuting attorney is to abandon a prosecution; and not where a motion to dismiss is made because of a variance between the

¹Reported in 116 Pac. 468.

charge and the proof and leave is asked to file a new information, under § 2316, providing that no dismissal on the ground of a variance shall bar another prosecution for the same offense.

CRIMINAL LAW — FORMER JEOPARDY — IDENTITY OF OFFENSES CHARGED. The dismissal of a prosecution for the violation of the adulterated food act, Rem. & Bal. Code, § 5455, charging the selling of decomposed veal, does not bar another prosecution for the violation of a disjunctive clause of the same section charging the sale of the product of a calf which died otherwise than by slaughter; since the offense charged was not the same, within *Id.*, § 5314, providing that a dismissal shall bar a prosecution where the same offense was charged in the second prosecution.

CRIMINAL LAW — FORMER JEOPARDY — DISMISSAL — VARIANCE — "PROOF" AND "EVIDENCE." Rem. & Bal. Code, § 2316, authorizing a second prosecution after a dismissal of a charge on the ground of a variance between the indictment or information and the proof, does not use the word "proof" in its technical sense as distinguished from "evidence," and hence applies where the prosecuting attorney moved to dismiss before trial on the ground of a variance between the charge and the "evidence" disclosed to him on interviewing the witnesses and preparing the case.

Appeal from an order of the superior court for Adams county, Kennan, J., entered October 18, 1910, dismissing a prosecution for a misdemeanor, upon sustaining a plea of former jeopardy. Reversed.

John Truax, for appellant.

Lovell & Davis, for respondent.

MORRIS, J.—Appeal from an order of dismissal upon sustaining a plea of former jeopardy. The facts upon which the court below based its ruling are these: On August 8, 1910, an information was filed against respondent, charging him with a violation of the adulterated food act, as found in Laws 1907, p. 478, ch. 211 (Rem. & Bal. Code, § 5453 *et seq.*). The offense charged was under subdivision 6 of § 3 (*Id.*, § 5455), in selling "a quantity of veal, which said veal was then and there wholly the product of a filthy, decomposed, and putrid animal substance, to wit, a calf unfit for food." Upon this information, respondent was arraigned

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and pleaded not guilty. On October 11, 1910, the state, in the meantime having satisfied itself, from consultation with the witnesses relied upon to sustain the charge, that a conviction could not be obtained because of a variance between the charge and the proof, applied for leave to dismiss the information, upon the ground of such variance and a defect in the information, and to file a new one, which leave was granted. Thereupon a new information was filed, under a disjunctive clause of the same subdivision, charging the sale of "a quantity of veal, which said veal was then and there the product of an animal, to wit, a calf, which had died otherwise than by slaughter." Respondent was arraigned upon this second information, and entered a special plea in bar, setting up the first information, the application and order of dismissal thereof, and claiming former jeopardy. To this special plea the state demurred, which demurrer was overruled, the plea sustained, the information dismissed, and the respondent discharged; from which the state, excepting, appeals.

The state supports its position under Rem. & Bal. Code, § 2316, providing that,

"No order of dismissal or directed verdict of not guilty on the ground of a variance between the indictment or information and the proof, or on the ground of any defect in such indictment or information, shall bar another prosecution for the same offense. Whenever a defendant shall be acquitted or convicted upon an indictment or information charging a crime consisting of different degrees, he cannot be proceeded against or tried for the same crime in another degree, nor for an attempt to commit such crime, or any degree thereof;" while respondent contends the proper rule to be applied is found in Rem. & Bal. Code, § 2315, providing:

"An order dismissing a prosecution under the provisions of sections 2311, 2312, or 2314, shall bar another prosecution for a misdemeanor or gross misdemeanor where the prosecution dismissed charged the same misdemeanor or gross misdemeanor, but in no other case shall such order of dismissal bar another prosecution."

Section 2311 relates to the filing of an information within thirty days after being held to answer to any criminal charge. Section 2312 provides for a trial within sixty days after the filing of information. These sections manifestly have no application here. Section 2314 provides:

“The court may, either upon its own motion or upon application of the prosecuting attorney, and in furtherance of justice, order any criminal prosecution to be dismissed; but in such case the reason of the dismissal must be set forth in the order, which must be entered upon the record. No prosecuting attorney shall hereafter discontinue or abandon a prosecution except as provided in this section.”

Reading sections 2314 and 2315 together, it is plain the dismissal there referred to is where it is the expressed purpose and intention of the prosecuting attorney, for the reasons given in the order, to “hereafter discontinue or abandon a prosecution,” and then such dismissal operates as a bar only when the same misdemeanor is charged in a second information. In other words, having expressly indicated a discontinuance and abandonment of the prosecution and permitted the defendant to go hence, the state may not thereafter withdraw such discontinuance or abandonment and again subject the defendant to a trial upon the same misdemeanor. It is manifest that this record discloses no intention on the part of the prosecuting attorney to discontinue or abandon this prosecution. On the contrary, it shows an avowed intention to continue the prosecution and subject the defendant to a trial for his alleged unlawful act, by making the dismissal and leave to file a second information parts of the same record, and setting forth in the moving papers the particular offense to be charged against the defendant in the second information, and the ultimate fact he was prepared to prove to sustain the charge. Neither was the offense charged in the second information the same misdemeanor charged in the first information. True, the misdemeanor charged in each information was of the same name or character,—“selling an adulterated

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article of food," which in the one case was "the product of a filthy, decomposed, and putrid animal substance, to wit: a calf unfit for food," and in the other "the product of an animal, to wit: a calf, which had died otherwise than by slaughter." In the one case, the gravamen of the offense was the selling of decomposed and putrid veal; in the other, the selling of veal cut from a calf which had died otherwise than by slaughter. Evidence which would sustain the first charge would not sustain the second, as in the first charge, the thing to be inquired into was the condition of the veal, while in the second, it was that the calf had not been slaughtered. Both were misdemeanors, but they were not the same misdemeanor. To steal \$10 from A and on the same day to steal his watch of the value of \$10, are both misdemeanors to be charged by the same name—petit larceny; but they are not the same misdemeanor nor the same larceny. Proof of one does not establish the other. Neither does proof of selling putrid veal establish that a calf died otherwise than by slaughter.

Respondent cites *State v. Durbin*, 32 Wash. 289, 73 Pac. 373, as supporting his contention that the order of dismissal is a bar. It will be noted that the first information in that case charged the defendant with assault and battery, a misdemeanor. Subsequently a second information was filed, reciting the same facts, and charging an attempt to commit mayhem, a felony. The first information was then dismissed, and the defendant's plea of former acquittal being denied, he was placed on trial and convicted of assault and battery. It was held that the dismissal of the charge of assault and battery was a bar to a second prosecution for the same offense, and that the defendant could not be tried upon an information charging a greater offense, including the lesser, and be convicted of the lesser offense, after his dismissal had operated as an acquittal of the lesser offense. That holding in no way conflicts with our present view. The criminal act consisted in the doing of the prohibited thing, not in the name given to

the act; and when an information charging an act was dismissed, and a second information charging the identical act was filed, it was a second prosecution for the same act, irrespective of the name given to it in either instance. In the present case, the act charged in the second information is not the act charged in the first information. It differs in the specific thing charged to be criminal; it differs in the character of evidence required and relied upon to sustain the charge. The person selling, and the person to whom the article is sold, are, in each instance, the same. But each information charged a different sale of a different prohibited article of food. In the *Durbin* case, we have the same act charged in both informations under a different name. In the present case, we have a different act charged in both informations under the same name; both a distinction and a difference.

Respondent's next contention in support of the judgment is based upon his definition of the word "proof," as used in Rem. & Bal. Code, § 2316; the argument being that there could be no variance between the information and the proof until the "proof" had been established by the state's evidence; and assuming the right of dismissal, it could only be granted after the introduction of the testimony on the part of the state showing the variance. The law never requires the doing of a vain or useless thing, and it does not appeal to us as sound to say the state could dismiss only after the introduction of its evidence and the incurring of needless expense in order to establish its contention of a variance. Such a requirement would result in benefit neither to the state nor the defendant, except it be to inform the defendant of the character and sufficiency of the evidence relied upon by the state to secure a conviction, which might be a benefit in fact but not in law. It will be admitted that, in a restricted and technical sense, there is a difference between the words "evidence" and "proof;" evidence being the medium through which proof is established, and proof being the effect of evidence rather than the evidence itself. *People v. Beckwith*,

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108 N. Y. 67, 15 N. E. 53. And this technical distinction has been upheld where, in the same statute, both words are used, upon the ground that the legislature, in making use of the two words, intended to establish and indicate a distinction between the two. *Jastrzemski v. Marxhausen*, 120 Mich. 677, 79 N. W. 935.

“But as in common use the end is often confounded with the means, so in language ‘proof’ is often used as a synonym with ‘evidence.’” *Hill v. Watson*, 10 S. C. 268.

And “in ordinary language the terms are used interchangeably, and the word ‘proof’ is used when ‘evidence’ only is meant.” *Perry v. Dubuque Southwestern R. Co.*, 36 Iowa 102. We think this is the sense in which the word “proof” is used in this statute, and that it was not intended that the state must proceed until evidence becomes proof before it can declare a variance, but that the prosecuting attorney owes a duty, to both the state and the defendant, to dismiss a prosecution when he is honestly satisfied from the facts within his knowledge that he has charged the wrong act. The defendant can be tried but once for the same act. Neither should the state be forced to put a defendant upon trial for an act which it is satisfied he has not committed, in order to thereafter be in a position to prosecute him for the act he has committed.

For these reasons we are of the opinion that the prosecuting attorney was entitled to set forth a variance and obtain leave to dismiss and proceed anew; and that having done so, the dismissal of the first information was not a bar to a prosecution under the second.

The judgment is reversed, and the cause remanded for further proceedings.

DUNBAR, C. J., CROW, ELLIS, and CHADWICK, JJ., concur.

[No. 9537. Department One. July 6, 1911.]

AMERICAN SAVINGS BANK & TRUST COMPANY, *Respondent*, v.
GEORGE B. HELGESEN *et al.*, *Appellants*.¹

BILLS AND NOTES—INDORSEMENT—BONA FIDE PURCHASER. Notes taken as collateral security for a preexisting debt are acquired for value, where the purchaser surrendered other security given when the debt was incurred.

SAME—TRANSFER. Since, under Rem. & Bal. Code, § 6255, usury does not render a note void, the defense of usury is not available against a holder acquiring the notes before maturity in good faith for value.

MORTGAGES—TRANSFER—DEFENSES—BONA FIDE PURCHASER. Where a mortgage debt is evidenced by negotiable paper, a transfer before maturity in good faith for value frees the mortgage from defenses by reason of infirmities not available against the notes.

MORTGAGES—DEEDS—GRANTING CLAUSE—AFTER-ACQUIRED TITLE—ESTOPPEL. An after-acquired title of mortgagors inures to the benefit of the mortgagee, although the mortgage contained no express words of warranty, where it did contain a granting clause, which, under Rem. & Bal. Code, § 8748, would in a deed constitute a covenant of seizin and for quiet enjoyment, sufficient to pass to a grantee an after-acquired title under Id., § 8765; since the same rule applies as between mortgagor and mortgagee.

BILLS AND NOTES—INDORSEMENT—ADDITION OF “WITHOUT RECOURSE”—EFFECT. The indorsement of a note “without recourse” does not let in equitable defenses, where the words “without recourse” were not written at the time the notes were acquired, but were subsequently inserted as an accommodation to the indorser in contemplation of a subsequent negotiation of the notes, the deal for which was not consummated.

PRINCIPAL AND AGENT—AUTHORITY OF AGENT—INDORSEMENT OF NOTE. An agent's authority to sign his principal's name to the indorsement of notes sufficiently appears, where he made the loan and was personally interested therein, and received the notes and had possession thereof as agent, although his power of attorney, standing alone, might not have been sufficient.

MORTGAGES—LIENS—PRIORITY. Notes and a mortgage given October 1st for a preexisting debt, assigned November 4th as collateral security for another preexisting debt, have priority over a judg-

¹Reported in 116 Pac. 837.

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Citations of Counsel.

ment secured against the mortgagors on December 4th; since liens securing preexisting debts take priority from the respective dates of their creation.

MORTGAGES — EXECUTION — SIGNING — ACKNOWLEDGMENT. Under Rem. & Bal. Code, § 8746, requiring deeds to be signed and making the acknowledgment a necessary part of its execution, the acknowledgment of a fully prepared mortgage which the mortgagor inadvertently omitted to sign, and which contains the mortgagor's name as grantor, is equivalent in law to a signing of it, or to the adoption of the entire instrument, including the name written thereon as grantor (GOSE and FULLERTON, JJ., dissenting).

Appeal from a judgment of the superior court for Mason county, Mitchell, J., entered January 20, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in consolidated actions upon promissory notes and for the foreclosure of mortgages. Affirmed.

George W. Bright, for appellant Helgesen, contended, among other things, that the mere acknowledgment by a party that she signed a written transfer which was not in fact signed, is not a substitute for signing, or proof of it. 1 Cyc. 541; *Jones v. Gurlie*, 61 Miss. 423; *Helton v. Asher*, 103 Ky. 730, 46 S. W. 22, 82 Am. St. 601; *Cheney v. Nathan*, 110 Ala. 254, 20 South. 99, 55 Am. St. 26; *Goodman v. Randall*, 44 Conn. 321. Where there is no legal execution of an instrument, the acknowledgment of it is a nullity, and cannot be sustained as against the rights of a judgment creditor. *Pratt & Fox v. Clemens*, 4 W. Va. 443; *Hall v. Redson*, 10 Mich. 21; *Drury v. Foster*, 2 Wall. 24. The statute required the signing of the instrument by the party to be charged, and this act could not be performed for him by the other party to the contract. 20 Cyc. 275, 276; *Bent v. Cobb*, 9 Gray (Mass.) 397, 60 Am. Dec. 295; *Carlisle, Jones & Co. v. Campbell*, 76 Ala. 247; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385. There can be no ratification or adoption of the acts of Gray, the grantee, in signing or executing the instrument for Mrs. Erickson. 1 Words and Phrases, p. 209; Id., vol. 7, pp. 5928-29; *Ellison*

v. Jackson Water Co., 12 Cal. 542; *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788; *Backhaus v. Buells*, 43 Ore. 558, 72 Pac. 976, 73 Pac. 342; *Ballard v. Nye*, 138 Cal. 588, 72 Pac. 156.

Hamlin & Meier, for appellants Erickson.

Farrell, Kane & Stratton, for respondent.

PARKER, J.—This is an action to recover judgment against Samuel Erickson and wife upon two negotiable promissory notes evidencing their community debt in the total sum of \$2,500, and also to foreclose two mortgages given to secure the same upon property in Mason county, one being upon land and the other upon personal property. George B. Helgesen was made a defendant because he has become the owner of the land by virtue of an execution sale thereof under a judgment rendered in his favor against the defendants Erickson and wife. A trial before the court resulted in a personal judgment against Erickson and wife for the amount of the notes, and a foreclosure of the mortgages against all of the defendants. From this disposition of the cause, the defendants have appealed.

The right of respondent to judgment upon the notes and to foreclosure of the mortgage depends largely upon its having become holder of the notes in good faith for value before maturity, and upon the lawful execution of the mortgage upon the land by Erickson and wife.

In October, 1906, Erickson and wife executed five negotiable promissory notes for the total sum of \$3,190, payable to a Mrs. DeWees. These notes were delivered to Charles H. Gray, her son, who was her agent in the making of the loan evidenced by the notes. These notes were secured by mortgages executed about the same time upon the same land and personal property here involved. While they were taken in the name of Mrs. DeWees, the evidence tends to show that the debt they evidenced was to some extent the property of

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Gray as well as of Mrs. DeWees. For the purpose of argument we will assume, as is contended by counsel for appellant, that the interest charged and agreed to be paid upon this loan was greater in amount than the highest rate allowed by law, and was, therefore, usurious under Rem. & Bal. Code, §§ 6251 and 6255. This usurious interest agreement did not, however, appear upon the face of the notes. It was accomplished by making the amount of the principal stated in the notes greater than the sum actually loaned. These notes matured at different dates, the first matured on February 1, 1907, and the last on February 1, 1908. Before the maturity of any of them, they were all assigned to respondent as collateral security to a loan evidenced by notes payable by Gray to respondent. This loan appears to have been a preexisting debt of Gray to respondent, but the evidence also tends to show that these DeWees notes were given to respondent in lieu of other securities which respondent then held as security for the Gray loan, and which were then surrendered to Gray. Just when these surrendered securities were delivered to respondent by Gray, relative to the time of the making of the Gray loan, is not clear; but the general course of business testified to between Gray and respondent indicates that they were given by Gray to respondent at the time of the making of the loan, or were substituted for other securities which had been given to respondent by Gray at that time. These notes were assigned to respondent by the endorsement of Mrs. DeWees made by Gray as her agent, and also by his personal endorsement. The mortgages securing these notes were also assigned to respondent about the same time.

On October 1, 1907, Gray's debt to respondent being still unpaid, or at least largely so, it evidently having been continued by renewal from time to time, and the larger part of the debt evidenced by the DeWees notes having matured, and the larger part of such matured portion being unpaid, respondent insisted that Gray procure new notes and mortgages from Erickson and wife to take the place of the DeWees notes

and mortgages as collateral security to Gray's indebtedness to respondent. Thereupon Gray procured from Erickson and wife the execution of the notes here sued upon. These notes were made payable direct to Gray instead of Mrs. DeWees. They bear no evidence of usury upon their face, and it is not claimed that they are tainted with usury, save as the DeWees notes were so tainted. At the same time, for the purpose of securing these new notes, new mortgages upon the same personal property and upon the same land were executed by Erickson and wife, except as it may be concluded that the new mortgage upon the land was not lawfully executed because of the failure of Mrs. Erickson to actually subscribe her name thereto with her husband. There were several places for Mrs. Erickson to sign in the execution of these new papers, in all of which she signed her name with her own hand, except upon the new mortgage upon the land. This new mortgage was then complete in every respect except as to her actual subscription in the usual place for signing at the foot thereof. Her name then appeared in full in the body of the mortgage with that of her husband as grantor. Her husband then subscribed his name thereto in the usual manner, and both of them then subscribed their names to all of the other papers. Acknowledgment of the execution of the mortgage as having been made on October 1, 1907, by both her and her husband is certified to in usual form by endorsement thereon by a notary public. It is clear from the evidence that Mrs. Erickson then intended to sign this mortgage, and that she thought she had signed it, as she had signed the other papers in connection with the giving of the new notes, and that she then actually acknowledged the execution of the mortgage. It is equally clear that the notary and others present thought she had then subscribed her name to the mortgage. This omission was not discovered until some months later. Soon after October 1, these new notes and mortgages were assigned to respondent by Gray, and the DeWees notes and mortgages were thereupon surrendered and

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cancelled. The evidence tends to show that the amount due on the DeWees notes was approximately the same as the amount of the new notes at the time of the substitution.

On October 18, 1907, the new mortgage on the land was duly recorded in the auditor's office of Mason county. On December 4, 1907, appellant Helgesen recovered a judgment against Erickson and wife in the superior court of King county upon a community debt owing to him by them. On December 7, 1907, a transcript of this judgment was duly filed in the office of the clerk of the superior court for Mason county, so that it then became a lien upon the land of Erickson and wife in that county under Rem. & Bal. Code, § 445. This judgment and an execution sale thereunder by the sheriff of Mason county is the basis of appellant Helgesen's title to the land. Thereafter it was discovered that Mrs. Erickson had not subscribed her name to the new mortgage upon the land. She was advised of that fact and asked to subscribe her name thereto, which she did in the presence of the same notary who had taken her acknowledgment thereto on October 1st. We think the evidence shows that she then signed it of her own free will, and that she then stated, in substance, that she thought she had signed it at the time of her acknowledgment on October 1st. This mortgage was again recorded on March 25, 1908, in the auditor's office of Mason county, but without any additional certificate of acknowledgment.

We will first notice the contention of counsel for appellants that respondent did not acquire the notes in good faith. It is undisputed that respondent acquired all of these notes, as well as all of the DeWees notes, long before maturity. Whether or not respondent acquired them in good faith involves only questions of fact touching the notice it had of the usurious interest charged and agreed to be paid upon the debt due from Erickson to Mrs. DeWees or Gray. A careful reading of all of the evidence convinces us that the trial court was fully warranted in concluding, as it did in ef-

fect, that respondent, at the time of acquiring both the DeWees notes and the new notes, had no notice whatever of the usurious nature of the agreement for interest upon the loan they were given to evidence, nor of any other possible defense available to Erickson and wife as against Mrs. DeWees or Gray. In reaching this conclusion, we assume that in this case the burden of proving good faith and want of notice of infirmities in the notes was shifted to respondent, under our holdings in *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884, *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801, and other cases. Neither have we overlooked the fact that respondent's proof upon this question consists almost wholly of the testimony of witnesses who were interested in respondent's favor. The trial judge saw and heard these witnesses testify, and while he may not have been required, as a matter of law, to find in respondent's favor upon this evidence alone, under the decisions last cited, yet he was privileged to so find, and under all the circumstances shown, we think he was fully warranted in so doing.

Touching the question of respondent acquiring the notes for value, it is insisted that they were taken as collateral security for a preexisting debt, and hence, are subject to any defense which could have been successfully urged against the original holder. Assuming that they were taken to secure a preexisting debt, which, however, may be well doubted, as a matter of law, in view of the substitutions made, we think they may be considered as being acquired by respondent for value. 7 Cyc. 932; *Peters v. Gay*, 9 Wash. 383, 37 Pac. 325. The case of *McDonald & Co. v. Johns*, 62 Wash. 521, 114 Pac. 175, it may be argued militates against this view. That case only involved the question of priority between two mortgages given to secure preexisting debts due different creditors. This case involves rights of an assignee of *negotiable notes* with the mortgage securing them, as collateral security to a preexisting debt, as against the lien of a subsequently rendered judgment upon the land mortgaged.

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That decision does not hold that the taking of negotiable paper under such circumstances is not in good faith and for value. We will presently notice how the mortgage is freed from infirmities, as well as the notes, by the transfer to respondent.

Since the contracting for a greater rate of interest than is allowed by law does not render the notes void under Rem. & Bal. Code, § 6255, it seems clear that the defense of usury is not available to the maker against a holder acquiring the notes in good faith for value before maturity. This is one of the infirmities curable by such a transfer. 29 Am. & Eng. Ency. Law (2d ed.), 521; 1 Daniel, Negotiable Instruments (5th ed.), 197; Rem & Bal. Code, § 3443.

It is insisted that while the notes, because of their negotiable character, may be freed from infirmities by the transfer, the mortgage is nevertheless subject to all of the defenses it would be in the hands of the original payee. There may be merit in this contention in cases where the debt secured by the mortgage is not evidenced by negotiable paper. Where it is so evidenced, the rule seems to be settled by the great weight of authority as stated in 1 Daniel on Negotiable Instruments (5th ed.), § 834, as follows:

“There is no doubt that a mortgage, or any other security given for the payment of a bill or note, passes by a transfer of the bill or note to the transferee. The doctrine has been laid down by a number of cases, and is stated by Mr. Hilliard, in his treatise on mortgages, that if a mortgage is given to secure a negotiable note, and both the mortgage and the note are transferred before maturity to a *bona fide* indorsee, such indorsee takes the benefit of the mortgage as well as of the note, clear of any equities between the original parties. ‘It is the debt which gives character to the mortgage, and gives the rights and remedies of the parties under it, and not the mortgage which determines the nature of the debt.’ ”

In 1 Jones on Mortgages (6th ed.), § 834, the learned author says:

“At common law, so far as a mortgage is merely a debt or security for a debt, it is a chose in action not negotiable, and

therefore not assignable. So far as a mortgage is a conveyance of the legal estate, an assignment or conveyance of such estate may be made by a deed in the usual form. A mortgage note, if negotiable in form, is of course assignable by indorsement, and the assignee takes the legal title to it.

“But the debt being the principal thing imparts its character to the mortgage; and although the mortgage itself in the beginning is only assignable in equity, the legal rights and remedies upon the debt have become fixed upon this incident of the debt, and the equitable principles in regard to the mortgage have become naturalized in the common law system. When, therefore, the debt secured is in the form of a negotiable note, a legal transfer of this carries with it the mortgage security; and inasmuch as a negotiable promissory note by the commercial law, when assigned for value before maturity, passes to the assignee free of all equitable defenses to which it was subject in the hands of the payee, it does not lose this character which it has under the commercial law when it is secured by a mortgage. The mortgage rather is regarded as following the note, and as taking the same character; and it is the generally received doctrine that the assignee of a mortgage securing a negotiable note, taking it in good faith before maturity, takes it free from any equities existing between the original parties.”

See, also, 27 Cyc. 1325; 20 Am. & Eng. Ency. Law (2d ed.), 1043. The decision of this court in *Spencer v. Alki Point Transp. Co.*, 53 Wash. 77, 101 Pac. 509, 132 Am. St. 1058, seems to be in harmony with this view.

It appears that when Erickson and wife executed the DeWees mortgage and this new mortgage on the land, they had not acquired legal title thereto. At that time they held the land under a contract of purchase, having paid only a part of the purchase price therefor. Thereafter they completed payment of the purchase price and received a deed vesting in them full legal title. It is insisted that the mortgage could in no event be any more than a charge upon the equitable interest in the land possessed by Erickson and wife at the time of its execution. This involves the question of whether or not the after-acquired title of Erickson and wife inured to the

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benefit of the holder of the mortgage. The fact that the mortgage does not contain any express covenants of warranty of title seems to be relied upon in support of this contention. While it is true that there is no express warranty of title in the mortgage, its granting clause is much farther reaching in its effect than a mere quitclaim. It is, that Erickson and wife "do by these presents grant, bargain, sell, convey and confirm unto the party of the second part," etc. The only words of a grant necessary to constitute a bargain and sale deed under Rem. & Bal. Code, § 8748, are "bargain, sell and convey;" and by the provisions of that section, a deed containing such granting words, "shall be adjudged an express covenant to the grantee, his heirs or other legal representatives, to wit, that any grantor was seized of an indefeasible estate in fee simple, free from encumbrance, done or suffered from the grantor, except the rents and services that may be reserved, as also for quiet enjoyment against the grantor, his heirs and assigns." It is quite clear from the provisions of Rem. & Bal. Code, § 8765, that under such a deed an after-acquired title by the grantor inures to the benefit of the grantee. Under our decisions, the same rule applies as between mortgagor and mortgagee. *Osborn v. Scottish-American Co.*, 22 Wash. 83, 60 Pac. 49; *Weber v. Laidler*, 26 Wash. 144, 66 Pac. 400, 90 Am. St. 726; *Peoples Sav. Bank v. Lewis*, 37 Wash. 344, 79 Pac. 932; *Gough v. Center*, 57 Wash. 276, 106 Pac. 774; 1 Jones, Mortgages (6th ed.), § 679.

The note here sued upon appears to be endorsed by Gray "without recourse." This, it is argued, was such a restricted endorsement as to permit of equitable defenses as against respondent. The evidence, we think, clearly shows that, when the respondent received the notes, the endorsement of Gray thereon did not contain the words "without recourse." But that, sometime thereafter, the notes were about to be sold to a prospective purchaser in Tacoma, with a view to applying the proceeds to Gray's indebtedness to respondent. Gray then

requested of respondent, and was permitted by it, to write over his endorsement the words "without recourse;" it being understood that such endorsement was only for the purpose of relieving Gray of personal liability, by reason of such endorsement, in the event the sale was consummated. The notes were thereupon sent to a Tacoma bank for the purpose of completing the sale, but it was not completed and the notes were returned to respondent. We think, under these circumstances, that this addition to the endorsements of Gray did not lessen the rights of respondent as to equitable defenses available to Erickson and wife against the notes.

It is insisted that the authority of Gray to transfer the original DeWees notes to respondent, by endorsing her name thereon as her agent, is not shown. Gray held a power of attorney from Mrs. DeWees which apparently gave him quite broad powers, though it may be doubted as to whether or not, standing alone, it was sufficient to authorize the transfer of these notes in this manner; but in view of the fact that Gray had made the loan, received the notes, and had possession thereof as agent for Mrs. DeWees, and in view of the fact that he was to some extent interested in the notes as owner, and his general course of dealing as the representative of Mrs. DeWees, we think, for the purpose of this case, his authority was sufficiently made to appear. It may be well doubted that this question has any relevancy to the matter here involved, since there is nothing to indicate that any apparent uncertainty as to Gray's power to make this endorsement would suggest to respondent that the notes were usurious.

The question of the priority between the lien of the mortgage and the lien of the judgment, upon which appellant Helgesen's title rests, seems to be clearly settled in respondent's favor by the decisions of this court. The notes and mortgages were given October 1st, and assigned to respondent about November 4th, while the judgment in favor of Helgesen was not rendered until December 4th. *Mann v. Young*, 1. W. T. 454; *Dawson v. McCarty*, 21 Wash. 314, 57 Pac. 816, 75

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Am. St. 841; *Hacker v. White*, 22 Wash. 415, 60 Pac. 1114, 79 Am. St. 945; *Lee v. Wrixon*, 37 Wash. 47, 79 Pac. 489; *Hicks v. National Surety Co.*, 50 Wash. 16, 96 Pac. 515; *McDonald & Co. v. Johns*, *supra*. Assuming, for the sake of argument, that the mortgage was given to secure a preexisting debt, and was also assigned with the notes as collateral security for another preexisting debt, the case last cited shows that the mortgage is nevertheless superior to the lien of the judgment upon which Helgesen's title rests, which judgment was rendered after the execution and assigning of the mortgage and notes. Where two liens, at the date of their creation, secure preexisting debts, the respective dates of their creation determines their respective priority.

We have proceeded so far upon the assumption that the mortgage was in law executed by Mrs. Erickson as well as by her husband, notwithstanding she did not actually subscribe her name thereto. Let us now inquire as to the correctness of that assumption. We have seen that, on October 1, 1907, the mortgage was complete in every respect save as to subscription of Mrs. Erickson's name thereto; that her name then appeared in the body of the mortgage as grantor with that of her husband; that she actually acknowledged its signing and execution as though she had actually subscribed it; that she believed she had actually subscribed it with her own hand; and that the notary certified to her acknowledgment in usual and proper form. This is not a question of some one signing her name to a mortgage for her, at her request, for it is plain from the evidence that she made no request of that nature. Indeed, it may well be doubted that a voluntary conveyance or encumbrance of land can be lawfully signed by some one other than the grantor so as to bind the grantor by the mere signing alone, as our general statutes of frauds indicates may be done in making of contracts other than those affecting title to real property; Rem. & Bal. Code, § 5289; for Rem. & Bal. Code, § 8746, provides that deeds,

and this of course means mortgages, shall be "signed by the party bound thereby." There is here presented the question of adopting the mortgage as a whole, including the name in the body thereof, as her signature thereto, by Mrs. Erickson. Now the requisites for the execution of a deed or mortgage under our statutes are, (1) that it be in writing; (2) that it be signed (not subscribed) by the party bound thereby; and (3) that it be acknowledged by the party making it, before some person authorized to take acknowledgments. In this case there is no question as to the deed being in writing, nor as to its being acknowledged, but only as to it being signed. This court has held, in harmony with the general rule, that:

"It is a well established rule of law that a contract is signed, within the meaning of the statute, whether the name of the party to be charged appears at the bottom, top, middle or side of the paper." *Tingley v. Bellingham Bay Boom Co.*, 5 Wash. 644, 32 Pac. 737, 33 Pac. 1055; *Anderson v. Wallace Lum. Mfg. Co.*, 30 Wash. 147, 70 Pac. 247.

It follows that the mere fact that her name was not written at the foot of the mortgage, in the usual place for signing, does not conclusively show a want of lawful signature thereto. Had she written her name in the body of the mortgage, in her own hand, it clearly would have been a good signing of the mortgage by her. The question then is, was her acknowledgment of the execution of the mortgage after it was fully prepared, with her name written therein as grantor, equivalent in law to a signing of it by her. In the case of *Newton v. Emerson, Talcott & Co.*, 66 Tex. 142, 18 S. W. 348, the supreme court of Texas had under consideration a situation almost identical with that here involved. There the deed was not subscribed by the grantor, but was duly acknowledged, the grantor's name appearing in the body thereof as grantor. The court said:

"Under this state of facts it is unimportant that the entire instrument, including the name of Charles G. Newton, was written by another, at his request; nor is it important whether he was present when it was written; for, it is well settled that

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by his acknowledgment before the officer he adopted and made his own, every word, including his own name, then upon the instrument. By that act, and the delivery of the instrument, he declared and made his name or sign, then on the paper, the evidence of his intention in reference to giving it validity and effect, as fully as though the name had been written by himself. *Bartlett v. Drake*, 100 Mass. 175; *Clough v. Clough*, 73 Me. 488; *Nye v. Lowery*, 82 Ind. 320; *Willis v. Lewis*, 28 Tex. 180; *Adams v. Field*, 21 Vt. 267; *Armstrong v. Stovall*, 26 Miss. 282; *Pike v. Bacon*, 21 Me. 287; *Bird v. Decker*, 64 Me. 552. It is to be regarded then as though entirely written by himself, for he declared that, as an entirety, it was his act; that he had signed and executed it."

The only difference we see between that case and this is the fact that the deed there appears to have been written at the request of the grantor, but it is apparent that that court regarded that fact as of no consequence, but rested the validity of the deed upon the ground of adoption of it by the grantor as his act. *Loyd v. Oates*, 143 Ala. 231, 38 South. 1022, 111 Am. St. 39; *Harwell v. Zimmerman*, 157 Ala. 473, 47 South. 722; *Chivington v. Colorado Springs Co.*, 9 Colo. 597, 14 Pac. 212; *Gribben v. Clement*, 141 Iowa 144, 119 N. W. 596, 133 Am. St. 157; *Currier v. Clark*, 145 Iowa 613, 124 N. W. 622; *Northwestern Loan & Banking Co. v. Jonassen*, 11 S. D. 566, 79 N. W. 840; 9 Am. & Eng. Ency. Law (2d ed.), 145; 1 Cyc. 540.

This view of the law, we think, is particularly applicable to the execution of a deed or mortgage in the state of Washington, in view of the fact that, under Rem. & Bal. Code, § 8746, the acknowledgment of the execution of a deed or mortgage seems to be as much a necessary part of its execution as the signing. Under this section, it is apparent that the acknowledgment has to do with the actual execution of the instrument rather than only for the purpose of entitling it to record, as was formerly, and is even yet in most states, the only purpose of an acknowledgment. We are of the opinion that this mortgage was executed by Mrs. Erickson on October 1, 1907, not-

withstanding she did not then actually subscribe her name at the foot thereof.

Counsel for appellants place some reliance upon the fact that all of the written portion of this mortgage which includes Mrs. Erickson's name as one of the grantors (by the written portion we mean that portion other than the printed form used) was prepared and in the handwriting of Gray, the mortgagee; and it is insisted that therefore he could, in no event, be the agent of Mrs. Erickson for the purpose of writing her name in the mortgage, and thus in effect signing it for her. In support of this contention our attention is called to *Wingate v. Herschauer*, 42 Iowa 506; *Carlisle, Jones & Co. v. Campbell*, 76 Ala. 247; *Tull v. David*, 45 Mo. 444, 100 Am. Dec. 385, and other authorities supporting the view that a grantee cannot become the agent of the grantor for the purpose of signing the latter's name to a conveyance. These authorities seem to be applicable to and support that view, but we have seen that this is not a question of some one writing Mrs. Erickson's name in the mortgage as her signature, by virtue of her previous request or authorization, but it is a question of her adoption of the entire instrument as written, including her name written therein as grantor, after the instrument is complete in form. In such a case we think the authorities we have cited show that it is utterly immaterial by what means, or by whom, the instrument was physically brought into existence. By her adoption of it, to paraphrase the language in *Newton v. Emerson* above cited, "she made as her own, every word, including her name as grantor, then in the mortgage."

We find no error in the record, and conclude that the judgment must be affirmed. It is so ordered.

DUNBAR, C. J., and MOUNT, J., concur.

Gose, J. (dissenting).—It appears from the majority opinion that Mrs. Erickson intended to sign the mortgage, and believed that she had done so until some time after the judgment

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lien attached, when she actually signed it. She did not intend to adopt her name written by another as her signature. This is shown, I think, by the entire record. Her failure to sign the mortgage was due entirely to an inadvertence and oversight. An intention to sign an instrument cannot be held equivalent to an actual signing of the instrument. If she intended to sign her own name to the mortgage and failed to do so by inadvertence, it would seem conclusive that she did not intend to adopt her name written by another as her signature. I think the judgment lien should be given precedence of the mortgage. To that extent I dissent from the view expressed by the majority.

FULLERTON, J., concurs with Gose, J.

[No. 9659. *En Banc*. July 7, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Gilbert Hunt et al., Respondent, v. EUGENE TAUSICK, as Mayor of the City of Walla Walla, Appellant.*¹

STATUTES — SPECIAL LEGISLATION — MUNICIPAL CORPORATIONS. Const., art. 2, § 28, subd. 8, prohibiting the enactment of special laws to incorporate any city or amend a city charter, is not violated by Laws 1911, p. 521, authorizing the cities of a specified population to adopt the commission form of city government.

SAME—POPULATION OF CITY—JUDICIAL NOTICE. Laws 1911, p. 521, authorizing cities having a population of 2,500 and less than 20,000 to adopt the commission form of city government, does not restrict its application to any particular city or special territory, as the court takes judicial notice that there are many cities within the limitation.

MUNICIPAL CORPORATIONS—LOCAL APPLICATION OF STATUTES. Laws 1911, p. 521, authorizing the adoption of the commission form of city government by any city now or hereafter having the required population, is not unconstitutional because of its optional features.

SAME—CLASSIFICATION OF CITIES. Laws 1911, p. 521, authorizing cities of the second class and cities of the third class having a

¹Reported in 116 Pac. 651.

population of 2,500 to adopt the commission form of city government,' does not violate Const., art. 11, § 10, requiring classification of cities by general laws in proportion to population, although it creates a new classification for this purpose within the old classes; since the constitution does not require uniformity of general laws relative to municipal corporations, and the act is general and of uniform operation.

CONSTITUTIONAL LAW—LEGISLATIVE POWER—DELEGATION — MUNICIPAL CORPORATIONS. Laws 1911, p. 521, authorizing the adoption of the commission form of city government, is not an unwarranted delegation of legislative power, in violation of Const., art 2, § 1, since it is complete in itself and may properly leave to a local board the determination of when or whether it will go into operation.

MUNICIPAL CORPORATIONS—ADOPTION OF COMMISSION FORM OF GOVERNMENT—ELECTIONS—SPECIAL OR GENERAL. Laws 1911, p. 521, § 2, providing that the commission form of city government may be adopted at a special election held for the purpose, is not void in that Const., art. 11, § 10, authorizes existing cities to become organized under general laws whenever a majority of the electors voting at a general election shall so determine; since the provision for a "special" election may be rejected as surplusage and the election held at the city's general election; neither does the constitutional provision make general the election held for such purpose, but merely fixes the time for holding it.

STATUTES—ENACTMENT—AMENDMENTS OR MODIFICATION OF EXISTING LAWS. Laws 1911, p. 521, § 2, authorizing the adoption of a commission form of city government, and leaving in force all existing laws not inconsistent with the act, is not violative of Const., art. 2, § 37, providing that no act shall be revised or amended without reference to its title, setting forth the amended section in full, and § 38, providing that amendments shall not be allowed which shall change the scope or object of the bill; since those sections of the constitution do not apply to the modification of existing laws by acts complete in themselves or by supplemental acts not altering the original act.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered June 5, 1911, in favor of the plaintiff, granting a peremptory writ of mandate to call a special election for the adoption of a commission form of government. Affirmed.

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Sharpstein & Sharpstein and *T. P. & C. C. Gose*, for appellant.

Edward C. Mills, J. C. Hurspool, and *Rader & Barker*, for respondent.

CROW, J.—Action in mandamus to compel Eugene Tausick, mayor of Walla Walla, to call an election under § 2, chap. 116, page 521, Laws of 1911. An alternative writ was issued. The mayor's motion to quash was denied. A peremptory writ was granted, and the mayor has appealed.

Appellant's sole contention is that the act in question is unconstitutional and void. It is entitled: "An act relating to the organization, classification, incorporation and government of municipal corporations, under a commission, and declaring an emergency." It has been ably reviewed and discussed in the briefs, and we will call attention to some of its features. Section 1 provides that any city, now or hereafter having a population of 2,500 and less than 20,000, as shown by the last state or Federal census or by any special census taken by the city in the manner provided by law, may become organized as a city under the provisions of this act. It is conceded that Walla Walla has a population of 19,364, as shown by the last Federal census. Section 2 provides that, upon the petition of electors equal in number to twenty-five per centum of the votes cast for all candidates for mayor at the last preceding election, the mayor shall submit the question of organization of the city at a special election, and that if a majority of the votes cast favor the proposition, the city shall proceed to the election of a mayor and two commissioners. Section 4 provides that all existing laws governing cities of the second class or applicable thereto, not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act; that all existing by-laws, ordinances and resolutions of the city shall remain in force until altered or repealed under the provisions of this act; that territorial limits shall remain the same; and that all

property rights and other rights shall continue and be protected. Section 7 provides for the nomination of candidates for mayor and commissioners at a primary election, nonpartisan in character, for petitions for nominations, the publication of names of candidates, the form of ballot, the method of voting, the classification of voters, the canvass of votes, and publication of the result; that the two candidates receiving the highest number of votes for mayor and the four candidates receiving the highest number of votes for commissioners shall be placed upon the ballot as the candidates for mayor and commissioners, at the general municipal election, and that the method of conducting the election, canvassing votes, and announcing the result shall be the same as by law provided for the election of officers in such cities, as far as the same are applicable and not inconsistent with this act. Section 10 provides that each member of the commission shall have the right to vote on all questions; that two members shall constitute a quorum; that two affirmative votes shall be necessary to adopt any motion, resolution, or ordinance; that yeas and nays are to be called and recorded; and that the mayor shall preside, but shall have no right of veto. Section 11 reads as follows:

“Cities organized under the provisions of this act shall have all the powers which cities of the second class now have, or hereafter may have conferred upon them; all which said powers shall inhere in and be exercised by the commission provided for in this act. The executive and administrative powers, authority and duties in such cities under commission, shall be distributed into and among three departments, as follows:

“(1) Department of public safety.

“(2) Department of finance and accounting.

“(3) Department of streets and public improvements.

“The commission shall determine by ordinance the powers and duties to be performed in each department; shall prescribe the powers and duties of officers and employees; may assign particular officers and employees to one or more of the departments; may require an officer or employee to per-

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form duties in two or more departments, and may make such other rules and regulations as they may deem necessary or proper for the efficient and economical conduct of the business of the city."

Section 12 provides that the mayor shall be superintendent of the department of public safety, that the two commissioners shall be assigned to the remaining departments, and that the commission shall, by majority vote, appoint a clerk and such other officers and assistants as shall be provided by ordinance. By other sections the chapter fixes the compensation of the commissioners according to population, provides for regular meetings, for the method of passing ordinances or resolutions relative to public improvements, public works, and the granting of franchises; provides for the recall of elective officers, and for the initiative and referendum.

Appellant's controlling contention is, that this act is in conflict with subd. 8, § 28, art. 2, and also § 10, art. 11, of the state constitution. The former provides that:

"The legislature is prohibited from enacting any private or special laws in the following cases: . . .

"(8) For incorporating any town or village, or to amend the charter thereof . . ."

The latter provides that:

"Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. . . ."

In 1890 municipal corporations in this state having less than 20,000 population were, by statute, classified as follows: Those having less than 20,000 and more than 10,000, as cities of the second class; those having less than 10,000 and more than 1,500, as cities of the third class; and those having not more than 1,500 nor less than 300, as towns. Rem. & Bal. Code, §§ 7479, 7480. For the general laws relating to the organization, powers, and government of cities

of the second class, see Rem. & Bal. Code, §§ 7584-7670. For those pertaining to cities of the third class, see Rem. & Bal. Code, §§ 7671-7718. The act now in question authorizes all cities of the population of cities of the second class, and a portion of the cities of the third class, to adopt the commission form of government. No city of the third class having less than 2,500 population can avail itself of its provisions. The entire act shows that cities exercising their option to thus organize are to have a governing body consisting of a mayor and two commissioners known as a commission, supplemented by a city clerk and such other subordinate officers and employees as may be provided by ordinance, and are to have and enjoy all powers and privileges of cities of the second class not inconsistent with the commission act. A new classification is thus created, of all municipal corporations within this state which have a population of 2,500 and less than 20,000. Although the act, by a novel system of procedure, authorizes the adoption of a commission form of government by existing cities having a population within specified limits, it neither contemplates, nor does it require, any material change in their municipal functions. On the contrary, it only affects the instrumentalities through which such functions are to be exercised. Although cities of the third class having more than 2,500 population electing to organize under this act will thereafter be subject to all existing general laws governing cities of the second class or applicable thereto and not inconsistent with this act, no lack of uniformity of operation of the law results therefrom, as all cities of the third class having the same population may, at their option, avail themselves of the same privileges and rights.

If we correctly grasp appellant's first contention, it is, as before stated, that the act violates subdivision 8 of § 28, art. 2, of the state constitution, in that it is a private or special statute providing for the incorporation of cities; that its proposed application is restricted to certain cities; and that it might in fact be restricted to a single city should all others

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refuse to avail themselves of its benefits. The clause of the constitution thus cited was not intended to prohibit the enactment of a statute such as the one now assailed, which is general in its terms and applicable to all cities within this state having a population of 2,500 and less than 20,000. We take judicial notice of the fact that many cities within this range of population are now organized and existing in this state. If they so elect, all of them, under the act, may avail themselves of the privileges it grants, and may do so without materially affecting their existing municipal functions. The act does not select any particular city or special territory to which it shall exclusively apply. Nor does it so limit the required population as to restrict its application to a single municipality. The constitutional inhibition cited is directed against the enactment of a statute selecting a specified or limited locality, and creating therein a particular municipal corporation, to which individual powers are exclusively granted.

Some contention is also made that what may be called the local option feature of the statute renders it invalid as legislation special in its character and lacking uniformity in its application throughout the state. We find no merit in this contention. The act provides that *any city now or hereafter* having the required population may become organized under its provisions, thus making it applicable to all such cities now existing or that may hereafter exist. This is tantamount to saying it is intended to affect every city in the state having the required population. All cities availing themselves of its benefits will find the measure of their authority, powers and municipal functions in the act itself, and in existing laws pertaining to cities of the second class which remain in force. This may be a peculiar, unique and unusual method of organization for municipal government, which will perhaps from time to time call for judicial construction. Possibly the plan thus provided for a commission form of government may not commend itself to universal approbation, but such suggestions do not concern the courts. Laws will not be

held invalid for any such reasons. All statutes regularly enacted and approved by the governor are presumed to be constitutional, and the courts will not declare them invalid unless they clearly violate some constitutional provision.

As cities of the third class having more than 2,500 population may, at their option, organize under this act, while other cities of that class having less population may not do so, appellant further contends a second and arbitrary classification of cities of the second and third classes is made—a classification within a classification; that the constitution, § 10, art. 11, *supra*, contemplates a classification in accordance with population, and that all laws affecting or pertaining to each separate class must be of uniform operation throughout the state. Although corporations for municipal purposes must be created by general laws and must be incorporated, organized and classified in proportion to population, it will be noted that our constitution relative to such corporations does not require uniformity of such general laws. It only requires that the legislation shall not be private or special. The controlling purpose of our constitution in this regard was to prohibit one city from receiving powers and privileges not equally open or available to all other cities of the same class.

That uniformity was not the object is evidenced by the fact that special charters in existence when the constitution was adopted were, by a further provision of § 10, art. 11, *supra*, permitted to continue in operation, and cities of more than 20,000 population were, by the same section, authorized to frame their own charters. Moreover, there is nothing in the constitution or in any statute of this state providing that, when a municipality organized as a city of the third class may attain a population of 10,000 or more, it shall *ipso facto* become a city of the second class. On the contrary, it will remain a city of the third class until by proper procedure and vote it decides to advance itself to, and become organized as, a city of higher grade. Thus, it may be seen that cities

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of the third class may progress to more than 10,000 population, without changing their organization or classification. It is evident that all laws pertaining to municipalities in this state must be general in their terms. By the enactment of this statute, which is a general law, the legislature has created another class of cities in proportion to population, for the purpose of authorizing their incorporation and organizing under a commission form of government, to be adopted by them at their option. We find no constitutional inhibition against its enactment or against the creation of such a class of cities. Notwithstanding appellant's contention to the contrary, we conclude the act in no way seeks to amend or repeal any statute creating cities of the second and third classes. It only creates a new classification of all cities having the population of cities of the second class and a portion of cities of the third class, without repealing or destroying their original classification. The mere fact that the constitution requires the classification of municipalities to be according to population does not further restrict the legislature as to the manner in which they shall be made or created. This constitutional provision is an authorization and not a limitation. It was undoubtedly adopted to avoid any contention that a classification according to population would be an arbitrary one. Many courts have held that an act general in its terms and operation, applicable to certain cities which may constitute a portion only of a class theretofore existing, creates a new classification in itself, and is valid as such. *Eckerson v. Des Moines*, 137 Iowa 452, 115 N. W. 177; *Parker-Washington Co. v. Kansas City*, 73 Kan. 722, 85 Pac. 781; *State ex rel. Jones v. Graham*, 16 Neb. 74, 19 N. W. 470; *McCarter v. McKelvey*, 78 N. J. L. 3, 74 Atl. 316; *Boyd v. Milwaukee*, 92 Wis. 456, 66 N. W. 603.

The cases cited hold that statutes made applicable to cities of certain population within a class theretofore organized are valid, have uniform operation throughout the state, and are not special laws; clearly recognizing that such acts of

themselves create a new class. Under our constitution it is, therefore, permissible for the legislature, after it has classified cities of the state, to create a class within such existing classes, so long as it does so by general laws and according to population. In *Eckerson v. Des Moines, supra*, the supreme court of Iowa, in a well-considered and able opinion which may be examined with much profit, sustained the constitutionality of a law quite similar to the one now under consideration. The constitution of that state not only prohibits special laws for cities, but also provides for uniform operation throughout the state of all laws pertaining to municipalities. The legislature had theretofore classified cities of the state as follows:

“Every municipal corporation now organized as a city of the first class, or having a population of fifteen thousand or over, shall be a city of the first class; every municipal corporation now organized as a city of the second class, or having a population of two thousand, but not exceeding fifteen thousand, shall be a city of the second class, and every municipal corporation having a population of less than two thousand shall be deemed a town.” Ann. Code of Iowa, 1897, § 638.

In 1907 the Iowa legislature passed an act to provide for the government of certain cities and the adoption thereof by special election. Section 1 of this act provided:

“That any city of the first class, or with special charter, now or hereafter having a population of 25,000 or over, as shown by the last preceding state census, may become organized as a city under the provisions of this act by proceeding as hereinafter provided.”

It will be thus noted that Iowa cities of the first class having a population of less than 25,000 were not included, and that the act created a new class within a class previously existing and continued in existence. Passing upon the validity of this classification, the Iowa court said:

“As we have seen, a law intended to have application to a class of municipalities is general, and it is not material that

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the class to which the law is to have exclusive application is carved out of a class theretofore created and existing."

If a new classification can thus be created within a single class previously created, we are unable to understand why a new classification may not also be created as has been done by chapter 116 now under consideration, by including therein all cities of one class and a portion of the cities of another, the next lower class. Our conclusion is that the law is not local, private, or special; that it is general in its terms and application; that it is uniform in its operation throughout the state; that its classification is in no manner arbitrary; and that it is valid and constitutional.

Appellant further contends the act violates § 1, art. 2, of the state constitution, in that it is an unwarranted delegation of legislative power. The rule is well established that a statute does not delegate legislative power so long as it is complete in itself when it has passed the legislature and has been approved by the governor, even though it is left to some local body to determine whether and when it shall go into operation. *Cooley*, Const. Lim. (7th ed.), pp. 164-166; *State v. Storey*, 51 Wash. 630, 99 Pac. 878; *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534; *Adams v. Beloit*, 105 Wis. 363, 81 N. W. 869, 47 L. R. A. 441; *State ex rel. Witter v. Forkner*, 94 Iowa 1, 62 N. W. 772, 28 L. R. A. 206; *Chicago Terminal Transfer R. Co. v. Greer*, 223 Ill. 104, 79 N. E. 46, 114 Am. St. 313; *State ex rel. Van Alstine v. Frear*, 142 Wis. 320, 125 N. W. 961.

Appellant further contends the act is invalid in that it violates that provision of § 10, art. 11, of the constitution which reads:

"Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a *general* election shall so determine. . . ."

Section 2 of chapter 116 (Laws 1911, p. 521), the act in question, provides that the mayor shall, upon a proper peti-

tion by proclamation, submit the question of organizing as a city under this act to a special election to be held at a time specified therein, and within sixty days after said petition is filed. The city of Walla Walla is organized, and now exists, under a special charter granted by the territorial legislature prior to the adoption of the constitution. Appellant argues that the constitutional provision last quoted was designed to preserve this city charter until such time as the electors of Walla Walla shall determine to organize under general laws; that the peremptory writ of mandate requires the mayor to call an election on July 10, the date of the city's general election; and that neither the mayor nor the trial court has power to change the election specifically declared by statute to be a special election into a general election to meet the requirements of the constitution. We find no merit in this contention. Any election which is not regularly held for the election of officers or for some other purpose which shall come before the electors at regular fixed intervals is necessarily a special election. Had the act in question merely provided for an election on the question of adopting the commission form of government, it would have been a special election. Had it gone further and directed that a general election should be called, it would still be a special election. Manifestly the word "special" is surplusage, and can be disregarded without affecting the validity or meaning of the statute. Moreover the word "general," found in the constitutional provision quoted, does not in fact make general the election therein mentioned and authorized. The framers of the constitution undoubtedly knew it would necessarily be a special election whatever it might be called. Their manifest intention was not to require a general election on the subject itself, but to require that the result of such election should be determined, not by a mere majority vote on the question, but by the majority of the vote at a general election. Chapter 116, Laws 1911, p. 521, does not fix the time for holding the election, further than to provide it shall be within sixty days from the

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filing of the petition. When, as in this case, the petition was filed within sixty days prior to a general election, it became the duty of appellant and the trial court to call the election at such a time as would comply with the constitutional requirement. The relators undoubtedly prepared and filed their petition at the time they did with this exact purpose in view.

Section 4 of the act contains a provision which reads:

"All existing laws governing cities of the second class, or applicable thereto, not inconsistent with the provisions of this act, shall apply to and govern cities organized under this act."

Section 7 contains a provision which reads:

"And in all elections in such city the election precincts, voting places, method of conducting election, canvassing the votes and announcing the results shall be the same as by law provided for the election of officers in such cities, so far as the same are applicable and not inconsistent with the provisions of this act."

Appellant contends these provisions are invalid and violative of § 37, art. 2, of the constitution, which provides that:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

And that they are also violative of § 38, art. 2, which provides:

"No amendments to any bill shall be allowed which shall change the scope and object of the bill."

The sections cited have no application. The act in question is complete in itself and in no manner attempts or assumes to amend, modify, or change any preexisting law. At the time it was passed no existing law pertaining to cities of the second class was before the legislature in the form of a bill, for consideration or amendment. On the contrary, all such laws were permitted to remain intact and undisturbed. Counsel for appellant, in support of their position, cite *Cop-*

land v. Pirie, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769, in which this court held unconstitutional an act relating to exemptions of personal property. A criticism of this case by Rudkin, C. J., in the subsequent case of *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 109 Pac. 316, will be hereinafter quoted. It cannot be any objection to this law that, in order to ascertain powers granted to cities organized under it, it becomes necessary to refer to existing laws relative to cities of the second class. The courts have repeatedly recognized the validity of reference statutes, a common and approved method of legislation in the absence of constitutional restrictions. 36 Cyc. 969, 970; Lewis' Sutherland, Stat. Constr. (2d ed.), §§ 405-407; *Spokane Grain & Fuel Co. v. Lyttaker*, *supra*; *Chelan County v. Navarre*, 38 Wash. 684, 80 Pac. 845; *Savage v. Wallace*, 165 Ala. 572, 51 South. 605; *Phoenix Assurance Co. v. Fire Dept.*, 117 Ala. 631, 23 South. 843, 42 L. R. A. 468.

In *Spokane Grain & Fuel Co. v. Lyttaker*, *supra*, Rudkin, C. J., speaking for this court, said:

"Nearly every legislative act of a general nature changes or modifies some existing statute, either directly or by implication, and as said by the court in *Ex parte Pollard*, *supra*, 'Whether an amendatory or an original act should be employed is a matter of legislative judgment and discretion which the courts cannot control.' The purpose of the constitutional provision was to protect the members of the legislature and the public against fraud and deception; not to trammel or hamper the legislature in the enactment of laws. . . . So long as a legislative act is complete in itself, and has a sufficient title, it satisfies the requirements of the constitution, whether it contains much or little. The legislature may embody all legislation relating to a given subject in a single act, or it may cover the subject by a succession of acts. This is entirely a matter of legislative discretion over which we can assume no control. . . . The appellants rely largely on the case of *Copland v. Pirie*, 26 Wash. 481, 67 Pac. 227, 90 Am. St. 769, and it must be conceded that their contention finds support in that decision. It was there held that the act of 1897 (Laws 1897, p. 93), relating to ex-

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emptions of personal property was amendatory of section 486 of Hill's Statutes and Codes (Rem. & Bal. Code, § 563), and was therefore void, because not enacted according to the requirements of the constitution. If the act of 1897 was strictly amendatory in its character, the conclusion of the court was unavoidable, but the legislature in its wisdom did not see fit to enact it in that form, and it may well be doubted whether the court did not go too far in limiting and restricting the legislature as to the mode it might pursue in the enactment of laws. *Lockhart v. City of Troy, supra*. In the course of its opinion in the case cited this court said: 'In construing similar constitutional provisions the courts seem generally to have held that this requirement does not apply to supplemental acts not in any way modifying or altering the original act, nor to those merely adding sections to an existing act, nor to acts complete in themselves, not purporting to be amendatory, but which by implication amends other legislation on the same subject.' The rule there stated is no doubt the correct one, but was not the act of 1897 a supplementary act within the meaning of that rule? It in no wise altered or amended existing laws, but simply increased the existing exemptions, by adding a new exemption of a different kind. The decision in *Copland v. Pirie* was controlled largely by the decision of the United States district court for this district, in *In re Beulow*, 98 Fed. 86, construing the same statute. That court proceeded upon the theory that 'The new act is not complete, but refers to a prior statute, which is changed, but not repealed by the new act, so that the full declaration of the legislative will on the subject can only be ascertained by reading both statutes, the very obscurity and the tendency to confusion will be found which constitutes the vice prohibited by this section of the constitution.' But how often must we look to two or more acts to ascertain the full declaration of the legislative will? No one will for a moment doubt the power of the legislature to exempt homesteads by one act, household goods by another, farming implements by a third, and so on; yet the full declaration of the legislative will on the subject of exemptions could only be gathered by referring to these several acts. Followed to its logical conclusion, this argument would compel the legislature to embody in a single enactment, or in amendments thereto, all legislation relating to a single

subject. Such was not the object or purpose of the provision in question. So long as a legislative act is complete in itself and does not tend to mislead or deceive, it is not violative of the constitution."

In *Savage v. Wallace*, *supra*, the supreme court of Alabama said:

"There is a class of statutes, known as 'reference statutes,' which impinge upon no constitutional limitation. They are statutes in form original, and in themselves intelligible and complete—'statutes which refer to, and by reference adopt, wholly or partially, preexisting statutes. In the construction of such statutes the statute referred to is treated and considered as if it were incorporated into and formed a part of that which makes the reference. The two statutes coexist as separate and distinct legislative enactments, each having its appointed sphere of action; and the alteration, change, or repeal of the one does not operate upon or affect the other.'—*Phoenix Assurance Co. v. Fire Department*, 117 Ala. 631, 23 South. 483, 42 L. R. A. 468. Such statutes are not strictly amendatory or revisory in character, and are not obnoxious to the constitutional provision which forbids a law to be revised, amended, or the provisions thereof to be extended or conferred by reference to its title only. That prohibition is directed against the practice of amending or revising laws by additions to, or other alterations, which without the presence of the original act are usually unintelligible. *Ex parte Pollard*, 40 Ala. 100; *State v. Rogers*, 107 Ala. 444, 19 South. 909, 32 L. R. A. 520."

Other objections which we cannot sustain are urged; but as they do not necessarily involve the validity of the statute, or affect the question whether the peremptory writ should issue, we will not lengthen this opinion with their consideration.

The judgment is affirmed.

DUNBAR, C. J., PARKER, ELLIS, MOUNT, FULLERTON, and MORRIS, JJ., concur.

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Citations of Counsel.

[No. 9530. Department One. July 8, 1911.]

E. M. STANTON, Respondent, v. W. H. DENNIS, Appellant.¹

CONTRACTS—BID—ACCEPTANCE—FURTHER WRITING—BREACH. A bid by a subcontractor, offering to do the carpentry work on a building for a specified price, with a notation "Formal contract to follow," does not constitute a completed contract, although accepted in writing, where it specified no time when the work should be commenced or completed, nor the character of the work or time for payment; and no action lies for its breach where the bidder did not prepare and forward for execution a formal contract embodying such further details as the character of the work required.

Appeal from a judgment of the superior court for King county, Tallman, J., entered November 18, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Brady & Rummens and *Henry W. Pennock*, for appellant, contended that there was no completed enforceable contract. 9 Cyc. 280; *Megrath v. Gilmore*, 10 Wash. 339, 39 Pac. 131; *McDonnell v. Coeur d'Alene Lumber Co.*, 56 Wash. 495, 106 Pac. 135; *Wardall v. Williams*, 62 Mich. 50, 28 N. W. 796, 4 Am. St. 814; *Morrill v. Tehama Consol. Mill & Min. Co.*, 10 Nev. 125; *Ferre Canal Co. v. Burgin*, 106 La. 309, 30 South. 863; *Edge Moor Bridge Works v. County of Bristol*, 170 Mass. 528, 49 N. E. 918; *Lyman v. Robinson*, 14 Allen 242.

John E. Ryan and *Grover E. Desmond*, for respondent, contended that the contract was complete, any further writing being but an unnecessary formality. 9 Cyc. 280; *Gooding v. Moore*, 150 N. C. 195, 63 S. E. 895; *Hodges v. Sublett*, 91 Ala. 588, 8 South. 800; *Pratt v. Hudson R. Co.*, 21 N. Y. 305; *Sanders v. Pollitzer Bros. Fruit Co.*, 144 N. Y. 209, 39 N. E. 75, 43 Am. St. 757, 29 L. R. A. 431; *Cohn v.*

¹Reported in 116 Pac. 650.

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his name after the word "Accepted," and returned the same to Dunnivant. Early in February, 1910, Dunnivant became financially embarrassed and sought the appellant and suggested to him the idea of putting the contract in the name of a third party. The appellant took the matter under consideration and Dunnivant returned to his home at Portland, Oregon, from which place he wrote the appellant as follows:

"W. H. Dennis, Portland, Oregon, Feb. 25th, 1910.
"White Building;
"Seattle, Wash.

"Dear Sir: Would like to have you write me and let me know what response you got to the telegrams you sent while I was there. I have had to turn all of my work over to the bonding companies as I was unable to pull through. It will help me a great deal if you will give me some information about the Spokane job and also the Tacoma job. I have been expecting a letter from you daily since my return, but so far have received none. Thanking you in advance, I am,

"Yours very truly,
"Phil E. Dunnivant."

To this the appellant answered by the following letter:

"Mr. Phil E. Dunnivant, Feb. 28, 1910.
"Portland, Oregon.

"Dear Sir: In answer to yours of last week, will say that under the circumstances it will be impossible to do the work as we talked of in our talk when you were up here and will have to arrange with some other contractor to do the work at Spokane and Tacoma. Am sorry but can not do any thing else as it has turned out. Yours truly,

"W. H. Dennis & Son."

The reply was as follows:

"Portland, Oregon, March 2nd, 1910.
"Mr. W. H. Dennis,
"Seattle, Wash.

"Dear Sir: Your letter of the 28th ult. received and carefully noted, under existing circumstances I do not feel like letting the contracts for the Tacoma and Spokane jobs go as there is good prospects in them for me, if I can make

no other arrangements with you I will have to carry them on as was first intended. I will probably be in Seattle some time in the near future and will talk the matter over with you, but in the meantime would like to know just how the work stands on the two jobs as I have my men ready to go on short notice. Trusting that I will hear from you as soon as possible, I beg to remain Yours very truly,

“Phil E. Dunnivant.”

No formal contract was ever forwarded for execution by Dunnivant, and none in fact was entered into, and thereafter the appellant prosecuted the work described in the writing through other parties. After the completion of the work, Dunnivant assigned his claim to the present respondent, who brought this action on the accepted writing to recover damages as for breach of contract. The cause was tried in the court below by the judge sitting without a jury, and resulted in a judgment in favor of the respondent for the full amount claimed: namely, \$1,700. To reverse the judgment, this appeal is prosecuted.

The principal question suggested by the record is whether the writing containing the bid of Dunnivant and the acceptance thereof by the appellant constituted the completed contract between the parties, or was it an agreement settling some of the terms of a contract to be entered into later. The face of the writing, it is at once apparent, indicates that it was intended as the latter rather than the former. After specifying certain particulars, it expressly provides that a formal contract is to follow. If the writing itself was intended as the completed contract, there would have been no need for this proviso. A contract complete in itself does not need the sanction of another contract. Again, the contract, when tested by the surrounding circumstances, seems incomplete. It refers to work of a particular character in a described building, yet it specifies no time when the work shall be begun, when it shall be completed, the character of the work that shall be performed, or when payment for the work

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shall be made. While the law in such cases implies certain conditions, namely, that the work shall be commenced and completed within a reasonable time after demand, shall be performed in an ordinary skillful manner, and shall be paid for within a reasonable time after its completion, it is apparent that these conditions might not satisfy the appellant. He was a subcontractor of Thompson-Starrett Company and bound to perform according to the stipulations of his written contract with them, which might vary materially from the stipulation implied by law. This being true, the appellant very naturally would want the contract under which the work was to be actually performed conditioned so as to accord with his contract with the original builder. The writing, in whatever aspect it is viewed, therefore, seems to us to point to the conclusion that it was not intended to be the final agreement between the parties.

The evidence also, we think, sustains this conclusion. The appellant testifies to the fact positively, and Dunnavant admits that such a thing was talked over between them, but that the purpose was to put the contract in more formal shape rather than supply any further details. Both parties were men of ability and experience, and it would hardly seem that if they intended this writing to be a complete contract between them they would solemnly provide, both in writing and orally, for a further agreement.

By the conditions of the writing it was Dunnavant's duty, after the acceptance by the appellant of the terms proposed, to prepare a formal contract embodying such terms and such further details as the character of the work required, and forward the same to the appellant for execution. Failing in this, he had no cause of action against the appellant, as the appellant could not otherwise be put in default, and of course no cause of action passed to his assignee by the assignment.

The judgment appealed from is reversed, and the case remanded with instructions to enter a judgment in favor of the

appellant to the effect that the respondent take nothing by his action.

DUNBAR, C. J., MOUNT, PARKER, and GOSE, JJ., concur.

[No. 9655. Department One. July 11, 1911.]

D. H. YOUNG, *Respondent*, v. W. SCHENCK *et al.*,
Appellants.¹

CORPORATIONS—REPRESENTATION BY OFFICERS—APPEAL—DISMISSAL. An appeal by a corporation will be dismissed on motion of a majority of its executive committee, in whom the management of its affairs is vested subject to revision by the directors, where it appears that all the directors and members of the executive committee save the president desire it, and a majority of the committee so expressed themselves at a meeting, though a formal resolution was not adopted.

APPEAL—DISMISSAL—COPARTIES. Parties joining in an appeal without any appealable interest cannot resist a voluntary dismissal.

APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—RECEIVERS. An appeal from an order appointing a receiver for an insolvent corporation will be dismissed on the ground of a cessation of the controversy where, since the order appealed from, the corporation confessed its insolvency and consented to the appointment of a receiver in an action in the Federal court.

CORPORATIONS—DIRECTORS—TITLE TO OFFICE—COLLATERAL ATTACK. Directors of a foreign corporation who have taken the oath of office and entered upon their duties are *de facto* officers, and entitled to dismiss an appeal taken by the corporation; and their authority cannot be collaterally impeached by the fact that they had not filed a written acceptance of their trust, as required by the laws of the state where incorporated.

Motions to dismiss an appeal from a judgment of the superior court for Stevens county, Carey, J., entered May 20, 1911, appointing a receiver for an insolvent corporation. Granted.

Cain & Macdonald, for appellants.

Merritt, Oswald & Merritt, for respondent.

¹Reported in 116 Pac. 588.

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Opinion Per Gose, J.

Gose, J.—On May 16, 1911, the plaintiff recovered a default judgment against all the defendants for nearly \$6,000, including attorney's fees and costs. Thereafter and on May 20, on the application of the plaintiff and without notice, a receiver was appointed for, and directed to take possession of, all the properties of both corporations defendant. Thereafter the defendant Germania Mining Company moved the court to vacate the order appointing a receiver for its property, upon the ground, (1) that the order was made without notice; (2) that the court acted without jurisdiction; (3) that no grounds existed for the appointment of a receiver; and (4) that it was not insolvent. Affidavits and counter affidavits were submitted to the court with the motion, and on June 2 an order was entered continuing the receiver. The order recites that, after reading the affidavits and counter affidavits, the court believed that the appointment of a receiver was necessary for the protection of the creditors of the corporation; that the motion to vacate the order appointing him was therefore denied; and that the receiver be continued as under the former order. Thereafter the defendants united, giving separate notices of appeal from the orders of May 20 and June 2.

Two motions to dismiss the appeal have been interposed. Two of the directors of the appellant Germania Mining Company, who are also members and constitute a majority of its executive committee, have filed a motion in proper person for the dismissal of the appeal. The respondent has also moved to dismiss the appeal on the ground that the controversy has ceased, in that the appellant Germania Mining Company, on June 20, in an action prosecuted against it in the circuit court of the United States for the eastern district of Washington, for the appointment of a receiver to take charge of its properties, filed its answer in that court, wherein it admitted its inability to meet its current obligations and indebtedness by reason of the lack of funds, and consented to the appointment of a receiver.

The record shows that the board of directors of the Germania Mining Company consists of six persons, three of whom reside in Germany and three in Spokane. The by-laws provide that an executive committee, composed of the president and two other directors, shall be appointed yearly by the board of directors or of the stockholders, for the management of the affairs of the corporation when the board of directors is not in session; that the executive committee shall have entire control and supervision of all the affairs of the corporation consistent with law and the by-laws, and in accordance with the general policy and specific directions of the board of directors or of the stockholders, and that the acts of the executive committee shall be reported to the board of directors at its meeting next succeeding, and that such acts shall be subject to revision or alteration by the board of directors, saving the rights of third parties. At a regular meeting of the executive committee held in the city of Spokane on June 20, all the members being present, a resolution was offered directing that steps be taken to secure the dismissal of the appeal. Two of the members present have filed affidavits stating that the resolution was regularly adopted by a majority vote. The third member and the secretary of the committee have filed affidavits stating that the resolution was not voted upon. But all agree that it was offered. The three directors in Germany unite with the two members of the executive committee in their effort to secure the dismissal of the appeal. This is shown by a cablegram annexed to the notice and affidavits.

It is obvious from what has been said that all the directors and members of the executive committee save the president desire the dismissal of the appeal, and that a majority of the executive committee so expressed themselves at the meeting referred to. If the resolution was not formally adopted, it was at least understood that a majority of the committee favored the policy expressed in the resolution. The corporate powers of a corporation can only be exercised through its of-

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ficers. The by-laws vest the general management of the affairs of the Germania Mining Company in its executive committee, subject to revision by the board of directors. The directors of a corporation can vest the performance of merely ministerial duties in an executive committee of their own members, and when all meet and consult, the decision of the majority is controlling. 10 Cyc. 1072-3. The other defendants, as we have seen, have united in the appeal. We find nothing in the record showing that they have any appealable interest in the order appointing and continuing the receiver for the property of the Germania Mining Company.

We also think that the motion of the respondent is well taken. There is nothing in the record tending to show any change in either the assets or liabilities of the Germania Mining Company between May 20 and June 20, except a statement in its answer filed in the Federal court on the latter date, that it had been disappointed in not receiving the promised loans from its managing officers in Germany.

The Germania Mining Company is a foreign corporation organized in the state of Minnesota. It is said that the directors and members of the executive committee who are seeking to dismiss the appeal have not filed a written acceptance of their trust, as they are required to do under the laws of Minnesota before they are authorized to act. It suffices to say that they were regularly chosen, took the oath of office, entered upon the discharge of their official duties, and were recognized as officers by its president. They are, therefore, officers *de facto*, and their title to the offices cannot be impeached collaterally, but can be impeached only in a direct proceeding by the state or by a person having an interest in calling it into question. 10 Cyc. 1056-7.

The motions to dismiss the appeal are sustained.

DUNBAR, C. J., FULLERTON, PARKER, and MOUNT, JJ., concur.

[No. 9345. Department One. July 11, 1911.]

SKAMANIA BOOM COMPANY, *Respondent*, v. C. M. YOUMANS
et al., *Appellants*.¹

LOGS AND LOGGING—TIMBER—DEEDS—RESERVATION—CONSTRUCTION—PUNCTUATION. In a deed of land reserving all timber and right to enter for the purpose of removing the timber and the construction and maintenance of a logging road thereon forever, the word "forever" will not be construed to refer only to the maintenance of the logging road, because set off by commas with that clause; since punctuation is of little aid in construction, and the real value and essence of the reservation was the timber and right forever to remove it.

TRESPASS—CUTTING TIMBER—TREBLE DAMAGES—PENAL STATUTES. Rem. & Bal. Code, §§ 939, 940, imposing treble damages for cutting and removing any timber "on the land of another person" unless the trespass was "casual or involuntary" or the defendant had "probable cause to believe that the land was his own," has no application where the owner of the fee cut and removed timber that had been reserved from the grant and belonged to another; since the statute is penal and must be strictly construed, and defendant had probable cause to believe that the land was his own, within the proviso fixing single damages.

Appeal from a judgment of the superior court for Skamania county, Holcomb, J., entered October 17, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for trespass. Modified.

Miller & Crass, for appellants.

George S. Shepherd, for respondent.

Gose, J.—This action was brought to recover treble damages for the cutting of standing timber. There was a judgment for the plaintiff. The defendants have appealed.

The essential facts are as follows: On September 8, 1900, one Day, being the owner of 160 acres of land in Skamania

¹Reported in 116 Pac. 645.

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Opinion Per Gose, J.

county, sold and conveyed it to one Sweeney, reserving unto himself, his heirs and assigns, "all the timber on the above described premises, and the right to enter into and upon the same for the purpose of removing said timber, and the construction and maintenance of a logging road thereon forever." On March 6, 1901, Day sold and conveyed all the timber on the land to respondent, together with "the right to enter into and upon the same for the purpose of removing said timber and the construction and maintenance of a logging road thereon forever. The intention being to grant to said corporation, the Skamania Boom Company, all the rights and privileges reserved by myself, my heirs and assigns, in a certain deed made by me to J. F. Sweeney on September 8, 1900." On February 11, 1903, Sweeney sold and conveyed the land to one Arnold and others, by an instrument wherein he covenanted with the grantees that he was seized in fee simple, and that the premises were free from all incumbrances, "except standing timber sold on said premises and right of way over same." On December 1, 1903, Arnold and his cograntees conveyed the land by a deed of quitclaim to the Skamania Lumber Company, a corporation, and on June 17, 1907, it conveyed the land to one C. M. Youmans, one of the appellants, by a deed of general warranty. The appellants are now the owners of the land. Prior to the commencement of the action, the appellants cut and removed from the land about 1,500,000 feet of standing timber. The trial court found that the timber was of the reasonable value of \$2,000, and entered a judgment against the appellants for \$6,000.

The appellants first contend that the word "forever" in the reservation clause in the first deed refers only to the construction and maintenance of the logging road, and that the respondent had only a reasonable time in which to remove the timber; whilst the respondent insists that the word "forever" has reference to both the right to remove the timber and to construct and maintain a logging road. The appellants ar-

gue that the punctuation in the reservation clause compels a construction in their favor. The original deed is not before us, but assuming that the certified copy carries the punctuation of the original deed, we do not think that the reservation clause is susceptible of the construction contended for by the appellants. It is elementary that a deed, like any other written instrument, will be read as an entirety for the purpose of determining its true meaning. The punctuation of an instrument is ordinarily of little aid in construing it. As was said in *Ewing v. Burnet*, 11 Pet. 39:

“Punctuation is a most fallible standard by which to interpret a writing; it may be resorted to, when all other means fail; but the court will first take the instrument by its four corners, in order to ascertain its true meaning; if that is apparent, on judicially inspecting the whole, the punctuation will not be suffered to change it.”

The reservation of the right to construct and maintain a logging road was no doubt for the purpose of giving a practical value to the right to enter upon the land for the purpose of removing the timber. The real value and essence of the reservation was the timber, with the right forever to remove it by means of a logging road.

The appellants next contend that the statute, Rem. & Bal. Code, §§ 939, 940, does not authorize the imposing of treble damages. We think this contention must be sustained. Section 939, so far as applicable here, provides that, whenever any person shall cut down or carry off any timber “on the land of another person . . . without lawful authority,” if judgment be given against him, it shall be given for treble the amount of damages awarded. Section 940 provides that, if it appear upon the trial that the trespass was “casual or involuntary,” “or that the defendant had probable cause to believe that the land on which such trespass was committed was his own,” judgment shall only be given for single damages. In *Gardner v. Lovegren*, 27 Wash. 356, 67 Pac. 615, it was held, that the statute under consideration is penal in

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its nature; that it would not be construed as an ordinary civil statute, but that it would be limited by the rule of strict construction. The statute is not applicable to the facts before us. The appellants did not cut the timber "on the land of another person" within the intent and meaning of § 939. Moreover, they had probable cause to believe "that the land on which such trespass was committed" was their own within the meaning of § 940. The statute does not provide that one who cuts the timber of another without regard to the place of cutting or to the ownership of the land from which it is cut shall be holden in treble damages. To fall within the statute the timber must be cut upon the land of another person, and the trespass must not have been casual or involuntary, but as was said in the *Gardner* case, "the intent to commit trespass must appear."

The respondent has cited 28 Am. & Eng. Ency. Law (2d ed.); p. 541; 25 Cyc. 1549; *McFeters v. Pierson*, 15 Colo. 201, 24 Pac. 1076; *Gulf C. & S. F. R. Co. v. Foster* (Tex. Civ. App.), 44 S. W. 199, and argues that these authorities announce a rule of interpretation which supports the judgment for treble damages. The Cyc. announces the rule that a contract for the sale of timber must be in writing under the statute of frauds, since standing timber is a part of the realty. The Ency. of Law says that, if the vendee under the contract is to have the right to the soil for a time for the purpose of the further growth of the timber, he has an interest in the land, and that such a contract must be in writing under the statute of frauds. The *McFeters* case holds that the locator of an unpatented mining claim who has fully complied with the mining laws is, so long as he continues such compliance, the owner of the claim for all practical purposes. The *Foster* case holds that an action for damages for the destruction of an orchard growing upon the plaintiff's land is a local action within the venue statute, and that the word "land," in its ordinary legal sense, comprehends everything

of a fixed and permanent nature, and therefore embraces growing trees. In *Seymour v. La Furgey*, 47 Wash. 450, 92 Pac. 267, this court held that a contract for the sale and removal of standing timber affects the title to real estate within the meaning of our venue statute. We do not question the view announced by these authorities. If the statute were not of a penal nature, it could be extended by an equitable construction to embrace the facts before us. The substantial title to the land, however, is in the appellants. The title to the timber was in the respondent, with the added right to enter upon the land, construct and maintain a logging road, and remove the timber. The case of *Northern Pac. R. Co. v. Myers-Parr Mill Co.*, 54 Wash. 447, 103 Pac. 453, cited by the respondent, is not in point. There the prevailing party owned both the fee to the land from which the timber was cut and the timber as well.

Finally, it is urged that the court erred in finding that the reasonable value of the timber exceeded the sum of one dollar per thousand feet. There is competent and substantial evidence to support the finding of the court as to the value of the timber, and we will not disturb its finding in this respect.

The judgment is reversed, with directions to enter a judgment in favor of the respondent for \$2,000, with interest from the date of such judgment. The appellants will recover the costs of this appeal.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

FULLERTON, J., concurs in the result.

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[No. 9356. Department One. July 11, 1911.]

THE STATE OF WASHINGTON, *Appellant*, v. L. C. HALL,
Respondent.¹

CRIMINAL LAW—APPEAL FROM JUSTICE COURT—DISMISSAL—FAILURE TO PROSECUTE. An appeal from a conviction in justice court should not be dismissed for lack of diligence in prosecuting the appeal for nearly a year, where it appears that defendant had no intention to abandon the appeal or hinder or delay the trial.

HIGHWAYS—USE—OFFENSES—SPEED OF AUTOMOBILE—COMPLAINT—SUFFICIENCY. A complaint in justice court charging that defendant, at M. in S. county, drove an automobile at a speed in excess of twenty miles an hour, frightening horses, and unlawfully refused to obey a signal to reduce the speed, is insufficient to charge a violation of Rem. & Bal. Code, § 2531, prohibiting unsafe or unreasonable speed upon a public road or street, or at any other place in excess of twenty-four miles an hour; since it does not charge excessive speed nor any place where twenty miles would be unlawful.

CRIMINAL LAW—APPEAL FROM JUSTICE COURT—ERRORS REVIEWABLE—SUFFICIENCY OF COMPLAINT. Upon appeal from a conviction in justice court, the prosecution must be dismissed if the complaint does not state a crime.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered September 6, 1910, dismissing a prosecution for a misdemeanor upon appeal from a conviction in a justice court, after sustaining a demurrer to the complaint. Affirmed.

Ralph C. Bell and *O. T. Webb*, for appellant.

DUNBAR, C. J.—The respondent was convicted in the justice court for the precinct of Marysville, county of Snohomish, state of Washington, on August 16, 1909, and fined in the sum of \$20 and costs. From this conviction he took his appeal to the superior court of the state of Washington in and for the county of Snohomish. No further proceedings

¹Reported in 116 Pac. 593.

were had in the cause until the 23d day July, 1910, when a motion was filed by the appellant in the superior court for the affirmance by that court of the judgment of guilty entered in the justice court and the awarding of sentence against the respondent for the offense in manner as if he had been convicted thereof in the superior court, on the ground that respondent had failed to diligently prosecute his appeal. Respondent filed in his behalf an affidavit setting up the reasons why the appeal had not been sooner prosecuted, and this affidavit was replied to on behalf of appellant. The court denied the motion, and then proceeded to determine that the complaint against the respondent did not state facts sufficient to constitute a crime, a demurrer upon such ground having been interposed in the justice court. Judgment was thereafter entered dismissing the cause, and this appeal has been taken from the order of the superior court denying the motion to award sentence against respondent and sustaining the demurrer of respondent, and from the judgment of dismissal.

We do not think that the court erred in denying appellant's motion to affirm the judgment of guilty entered in the justice court for the reason that respondent had failed to diligently prosecute his appeal; for conceding, without deciding, that it was the respondent's duty, any more than it was the duty of the state, to bring the cause to a hearing, the affidavit filed satisfies us that there was no intention whatever on the part of the respondent to abandon the appeal or to hinder or delay the trial of the cause.

The learned attorney for the state insists that, while the information is crude, yet it sufficiently states a crime under the laws. The information, after the entitling of the cause, is as follows:

"Donald McRae, being first duly sworn on oath says: That at Marysville, in said Snohomish county, state of Washington, on the 4th day of August, A. D. 1909, L. C. Hall did commit a misdemeanor as follows: Then and there

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being the said L. C. Hall, while having charge and control of an automobile, did approach a vehicle drawn by horses, in which a person was riding and the said L. C. Hall approached at a speed in excess of twenty miles an hour, and the horses attached to said vehicle became frightened and the occupant of said vehicle signaled to said L. C. Hall to reduce the speed of said automobile, and the said L. C. Hall unlawfully refused to obey said signal and failed and refused to reduce the speed of said automobile but continued at the aforesaid speed to within ten feet of said vehicle, contrary to the form of the statute in such case made and provided and against the peace and dignity of the state of Washington."

The statute under which the information was evidently drawn is as follows:

"Every person who shall drive or operate, and every owner, lessee or other person in charge thereof who shall permit to be driven or operated, any automobile or motor vehicle . . . 4. Upon any public road, highway, park or parkway, street or avenue, at any unsafe or unreasonable rate of speed, having proper regard to the safety of any other person or persons using the same, shall be guilty of a misdemeanor." Rem. & Bal. Code, § 2531.

It will be observed that the respondent is not charged with driving the automobile at an unlawful speed upon any public road, highway, park, or parkway, street or avenue, but the information charges him only with so driving in Marysville, in Snohomish county, state of Washington. Subdivision 3, § 2531, Rem. & Bal. Code, provides that such person shall not drive his automobile at any other place than the place mentioned at a rate of speed faster than one mile in two and one-half minutes. This would be at the rate of twenty-four miles an hour. So that there is a place where the automobile could be driven at a faster rate of speed than the rate mentioned in the information, without violating the law. The place where this driving was done may have been in a private inclosure and, if so, the rate of twenty miles an hour would have been a lawful rate. It is true that pleadings in a justice court should be very liberally construed. At the same time there

must be a crime charged, and if the information shows on its face that the defendant might have done the thing or things charged in the information and yet have been guiltless of a crime, he ought not to be put upon his trial.

It is also contended by the appellant that the court had no authority to pass upon the demurrer, the demurrer having been presented in the justice court. But if, in the opinion of the court, the information did not state a crime or misdemeanor, it was his duty to quash it.

The judgment will be affirmed.

MOUNT, PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9523. Department Two. July 11, 1911.]

WILLIAM P. TRIMBLE *et al.*, Appellants, v. THE CITY OF SEATTLE, Respondent.¹

TAXATION—EXEMPTIONS—PRESUMPTION. There is no implied exemption from the burden of taxation.

MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—PROPERTY ASSESSABLE—LANDLORD AND TENANT—LIABILITY FOR TAXATION—PUBLIC LANDS. A leasehold interest in state tide lands is assessable for local improvements under laws passed since the execution of the lease; since the common law rule of an implied covenant in a lease that the lessor shall pay the taxes has no application to a lease of public lands the fee of which is not subject to taxation.

Appeal from a judgment of the superior court for King county, Main, J., entered January 11, 1911, upon findings in favor of the defendant, confirming an assessment against property benefited by a local improvement, after a hearing before the court. Affirmed.

Geo. McKay, for appellants.

Scott Calhoun and *Howard A. Hanson*, for respondent.

¹Reported in 116 Pac. 647.

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Opinion Per DUNBAR, C. J.

DUNBAR, C. J.—This is an appeal from a judgment of the superior court of King county, confirming an assessment against certain leasehold interests in first-class tide lands. The leases were issued under the acts of 1897 as amended in 1899. They were executed in 1899. In the legislative act of 1905, Laws 1905, p. 267, § 1, it was provided that:

“All leasehold, contractual or possessory interests in any tide lands owned by the state of Washington in fee simple (in trust or otherwise), situated within the limits of any incorporated city or town in this state, and which have been leased by the state, or which are held by any person, firm, association, private corporation or municipal corporation under a contract of purchase from the state, may be assessed and charged for the cost of all local improvements specially benefiting such leasehold, contractual or possessory interest, which may be ordered by the proper authorities of such city or town,” etc.

Section 1 of the act of 1907, Laws 1907, p. 123, is as follows:

“Any city of the first class in the state of Washington is hereby authorized and empowered to include within any local improvement district formed by it the whole or any part of any land in school sections or tide lands, title of which remains in the state of Washington; and said city is authorized and empowered to assess the cost of any local improvement against any such tide or school land in the same manner as if the same were private property: Provided, however, that the interest of the state in such property shall not be sold to satisfy the lien of such assessment, but only such interest, or contract, or other right therein as may be in private ownership, shall be subject to such sale.”

These laws were in existence at the time the city of Seattle passed an ordinance creating a local improvement district and providing for an assessment to pay the costs and expenses of such improvements within the limits of said districts. The leasehold interests in question, it will be noticed, were executed prior to the passage of this ordinance, and also prior to the passage of the laws just quoted. The find-

ings of the court, among other things, are to the effect that the property described, which property is the subject of this controversy, is subject to assessment for said improvement, and especially benefited by said improvement in an amount in excess of the sum assessed against the same upon such reassessment roll, and said property is assessed proportionately to other property throughout said local improvement district. It is not contended that the proper proceedings relating to the reassessment were not taken by the city of Seattle. Due notice of the hearing upon the reassessment roll was given, as provided by the law and the charter and ordinances of the city of Seattle.

The findings of fact are not contested by the appellants, except as to one or two findings which it is contended by the appellants are more properly conclusions of law than findings of fact. But the principal contention is that, inasmuch as these leasehold interests had been acquired by the appellants prior to the passage of the laws providing for their assessment which we have quoted above, the appellants' rights must be determined under the rule of the common law; that in the absence of a covenant or condition to the contrary, it is an implied covenant in every lease that the lessor shall pay all taxes and assessments levied on the leased land during the term; and that no statutory provision to the contrary had been passed at the time the leasehold interests were executed. Conceding this to be the established law in relation to private contracts or contracts between private individuals, it seems to us that a distinction must exist between a contract between private individuals, where the property leased or granted or sold is property which is already subject to taxation and where the parties must necessarily enter into the contract having in mind the burden of taxation upon said property, and a contract entered into by a private individual and a sovereignty where the property, by reason of its being the property of the sovereign, was not subject to taxation. It has been the universal announcement by courts and law

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writers that, inasmuch as taxation is necessary to the existence and perpetuation of government, there will be no implied exemptions from that burden. Chief Justice Marshall, in delivering the opinion of the court in *Providence Bank v. Billings*, 4 Pet. 514, among other things, said:

“That the taxing power is of vital importance; that it is essential to the existence of government; are truths which it cannot be necessary to re-affirm; they are acknowledged and asserted by all. It would seem, that the relinquishment of such a power is never to be assumed; we will not say, that a state may not relinquish it; that a consideration sufficiently valuable to induce a partial release of it may not exist; but as the whole community is interested in retaining it undiminished; that community has a right to insist, that its abandonment ought not to be presumed, in a case in which the deliberate purpose of the state to abandon it does not appear.”

It is conceded that there is no expressed purpose on the part of the state in the contract under discussion to relinquish the right to demand the payment of taxes upon the leasehold interest sold by the state. In *Wells v. Savannah*, 181 U. S. 581, Justice Peckham, speaking for the court, said:

“The payment of taxes on account of property otherwise liable to taxation can only be avoided by clear proof of a valid contract of exemption from such payment and the validity of such contract presupposes a good consideration therefor. If the property be in its nature taxable the contract exempting it from taxation must, as we have said, be clearly proved. It will not be inferred from facts which do not lead irresistibly and necessarily to the existence of the contract. The facts proved must show either a contract express in terms; or else it must be implied from facts which leave no room for doubt that such was the intention of the parties and that a valid consideration existed for the contract. If there be any doubt on these matters, the contract has not been proven and the exemption does not exist.”

It would seem that grave doubts would exist if we were to look to the contract only concerning this exemption, and it is not from the contract that the appellants claim the exemp-

tion, but from the general rule which obtains in private contracts where, as we have seen, the contract is with reference to property which is known to be taxable at the time the contract is made.

Appellants rely upon *Charles River Bridge v. Warren Bridge*, 11 Pet. 420. But that case, construed in connection with the general rule announced by the supreme court of the United States in the cases from which we have just quoted, and which follow the rule announced by all courts and text-writers, does not sustain appellants' contention, and is not applicable to the circumstances of this case. The learned attorneys for the respondent have expressed so clearly the status of the law of this case that we take pleasure in incorporating their language in this opinion and adopting it as a part of the opinion of the court. It is said:

"There is a clear distinction to be noted between leases between private parties and leases granted by the state in respect to taxes and assessments. In leases between private parties, the entire estate is, at the time of the execution of the lease, in private ownership—subject to taxation and assessment. Whether the land is used or not, leased or not, taxes are levied against the entire estate, and in leasing it the question of taxes and assessments against the land as a whole becomes one of the elements necessarily affecting the consideration of the lease. In a lease granted by the public, however, the fee is not taxed, being public property, and the question of taxes does not enter into the consideration. After the state's lease is granted—the leasehold interest passes into the common mass of private property, completely severed from the remaining non-taxable state fee so far as the matter of taxation was concerned—stripped from the remaining fee interest as fully as if the state had sold one of two state tide land lots—the estate sold was public, is now private—was not taxable, is now taxable, and the question of when and to what extent the taxing power of the state shall be exercised upon the tide land lot sold or the tide land lease sold by the state, in nowise enters into the consideration in the sale of the lot or the sale of the lease. After the tide land lot is sold, it becomes private property and the entire private interest is

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taxable; after the tide land lease is sold it becomes private property and the entire private interest is taxable—true, it must be taxed as separate entity from the public fee, but it is nevertheless subject to the common burden of taxation.”

But outside of general authority, we think this question has been put at rest by the decisions of this court. In *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 507, it was held that a leasehold interest in tide lands under leases from the state is subject to taxation. While it is true that the case was decided against the contention of the city in that case upon another proposition, nevertheless it was stated by the court in the discussion of the case that two questions were presented, (1) is such leasehold interest taxable; and (2) if taxable, should it be assessed as realty or personal property. Noticing the contention that the leasehold interest was not taxable, we said:

“But we think it cannot, under the general scheme and purpose of taxation, successfully bear the test of practical application. Doubtless a prospective lessee would bid more for a lease if he knew that his leasehold interest would not be taxed. But the same may be said of a prospective purchaser of state lands. He would pay more for the fee if he knew it would remain exempt from taxation. The difference between the two is in degree only, and not in character. But it is the policy of our commonwealth that the fee in any real estate sold by the state shall thenceforth be assessable. As soon as title passes from the state the land becomes private, and no longer public, property. When a lease is given by the state to an individual or private corporation, the lessee thereby obtains for his or its private use certain rights and privileges in, to and upon such real estate. These rights and privileges constitute private property over which the lessee has, and may exercise, absolute dominion and ownership within the limitations of his or its lease. Why, as such property, its should not be subject to the general rule of taxation, we conceive of no reason.”

In *Rabel v. Seattle*, 44 Wash. 482, 87 Pac. 520, it was also held that a leasehold interest in state lands was subject to taxation, although it was not subject to an assessment for

local improvements made prior to the time of the letting of the land by the state. This announcement of the policy of the state was again indorsed and ratified in *Coast Land Co. v. Seattle*, 52 Wash. 380, 100 Pac. 856, where it was said:

“The legislature may authorize the assessment of a leasehold interest for a local improvement in so far as the leasehold interest is benefited by the improvement, and may provide for a sale of the leasehold to satisfy the lien of the assessment; in fact we have so held in *Rabel v. Seattle*, 44 Wash. 482, 87 Pac. 520.”

In that case it was also held that a leasehold interest could not be sold to satisfy an assessment against the entire fee. But the disposition which was made of these cases only went to the method of collecting the assessments, while in each instance they affirmed the doctrine that the leasehold interest was assessable; and believing that the announcement made in those cases is in harmony with the general principles of law in relation to taxation, we indorse what was said therein.

The judgment is affirmed.

ELLIS, CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9449. Department Two. July 11, 1911.]

CHARLES I. WELSH *et al.*, *Respondents*, v. RONALD
McDONALD, *Appellant*.¹

FIXTURES—BUILDINGS—TRADE FIXTURES—LANDLORD AND TENANT. Mill and camp buildings are removable before the expiration of the terms as trade fixtures, under a lease for the purposes of a mill site for a shingle mill.

FIXTURES—LANDLORD AND TENANT. A tenant does not lose the right to remove trade fixtures before the end of the term by attorning to a successor in interest of the landlord, without any notice to quit or termination of the original tenancy.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered October 15, 1910, upon the

¹Reported in 116 Pac. 589.

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verdict of a jury rendered in favor of the plaintiffs, in an action in tort. Reversed.

Troy & Sturdevant, for appellant.

Thomas M. Vance, for respondents.

DUNBAR, C. J.—The plaintiffs brought this action for alleged injuries to real property committed by the defendant, alleging that plaintiffs were the owners of certain described property whereon were situated mill buildings, camp buildings, barns, and outhouses, which were a part of the described real property belonging to the plaintiffs; that the defendant had wantonly and recklessly destroyed the said buildings, torn them down, and shipped them away, converting the material constituting them to his own use; alleging the value of the buildings to be \$1,000; alleging damages in that sum, and demanding judgment therefor. The defendant answered, admitting the tearing down and removal of the buildings aforesaid, but alleging affirmatively that he was in the occupancy by lease of a portion of the premises described in the complaint; that theretofore the owners of the portion of the premises upon which the shingle mill was situated leased the same to Messrs. Craft & Son for mill purposes and for a sawmill site; that after the lease of same by Craft & Son, they erected a shingle mill thereon, and constructed certain works and buildings to house and cover the said shingle mill, and certain bunk houses to be used in connection therewith; that each and all of said buildings were erected for mill purposes; that by mesne conveyances the defendant afterwards became the owner, long prior to July 1, 1909; and that prior to the expiration of said lease on the 1st day of July, 1909, the defendant removed all of the said mill machinery and the portion of said mill buildings used in connection therewith; alleging that he had good and lawful right so to do. Upon these issues the case went to trial to a jury, resulting in verdict for plaintiffs in the sum of \$453.35.

Judgment was entered upon this verdict, and appeal followed.

At the time of the original lease, all the property mentioned in the complaint was owned by one Edward Callow, and it was leased by him to Craft & Son by the following informal contract:

“Contract for lease of land for mill site, by and between E. Callow, parties of the first part, and Craft & Son, parties of the second part.

“Mr. E. Callow agrees to give said Craft & Son lease to use for a mill site five acres of land situated in the S. W. of S. E. 4, section 28, township 19, N. R. 4 West. Said 5 acre situated in southeast corner of said forty. Said lease to run as long as said Craft & Son want it for a mill site. Said Craft & Son to pay twenty-five dollars a year, one-half when mill is completed and one-half every six months thereafter as long as used for mill site.

“(Signed) Edward Callow
“Craft & Son.”

Subsequent to the execution of this lease and the erection of the buildings mentioned in the complaint, Mrs. Callow, wife of Edward Callow, after the death of Edward Callow, sold to the respondents 120 acres of land, in the body of which were embraced the five acres described in the lease above set forth.

The appellant assigns many errors, but with the view we take of the main proposition in the case, it is not necessary to discuss them, as it appears conclusively to us that, under the circumstances as shown at the trial, the plaintiffs were not entitled to recover. The determinative question is, Were the houses which were torn down and removed, trade fixtures within the contemplation of the law? There is no intention, in relation to the permanency of these buildings, to be gathered from the lease; so that the question will have to be determined by the character of the buildings, or by intention shown outside of the instrument of lease. It is conceded that the old common law rule in relation to fixtures has been

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greatly modified, and that many things which under that rule were held to be fixtures are now regarded as trade fixtures, the removal of which by the tenant is permitted. It is said in 19 Cyc. 1047:

“If the annexation is not intended to be permanent, the chattel will not be deemed a fixture. As it is sometimes expressed, ‘it must be for the benefit of the inheritance.’ The degree and mode of annexation may be looked at, and whether it is to make the chattel or the land more useful.”

The testimony shows that all these buildings were erected exclusively for the benefit of the milling business which was carried on by the lessors. Many of the small houses were built by the laborers employed by the mill owners, and the laborers were charged by the mill owners for the lumber which was used in the construction of said small houses.

“That articles which are annexed by the tenant for purposes of trade, known as ‘trade fixtures,’ are removable by him as against the landlord, has been recognized from an early period in the development of the law of fixtures, the theory being that it is public utility that the tenant should be enabled to improve the property for the purpose of carrying on trade, without thereby forfeiting his improvements.” 1 Tiffany, *Modern Law of Real Property*, § 240.

“The strict rule of the early common law under which chattels which had been physically annexed to the freehold became the absolute property of the landlord has been gradually and greatly relaxed in favor of tenants. The first exception to this rule was made in the case of trade fixtures so called such as were placed upon the premises by the tenant during the term for the purpose of carrying on trade, commerce or manufacture. It is now a general rule that whatsoever is affixed, as a trade fixture to the land or to any building which is on the land during the term whether made of wood, stone, iron or other material, is removable by the tenant at the end of the term. And it is difficult to conceive of any so-called fixture, however solid, permanent and closely attached to the realty which is placed there for the sole purpose of trade which may not be removed by the tenant at the end of his term.” 2 Underhill, *Landlord & Tenant*, § 736.

Under this modern rule it has been uniformly held that a building erected upon leased land for the purpose of carrying on the business of the lessee was removable at the will of the lessee, provided it was removed during the term of the lease. We will not cite further authority on this proposition, for as we understand it, the rule is practically conceded by the respondents, for it is said in their brief:

“There need be no contention on the general question that known and recognized trade fixtures, even though they constitute things that might become and be part of the realty, are removable unless it is understood that they are to remain and become part of the real property.”

It is, however, contended by the respondents that there was an understanding that the houses should remain upon the land, as shown by the testimony of Mrs. Callow. The testimony relied upon is as follows:

“Q. Do you remember the occasion of your late husband entering into a contract with Craft & Son? A. Yes, sir. In fact, my husband was sick at the time, so I did most of the business myself. Q. Do you remember that at that time or subsequently there was any conversation or agreement between yourself and Craft & Son or your husband and Craft & Son as to the title of the buildings that might be erected there? A. No. No more than what Mr. Craft gave yesterday. The agreement was just as he testified. He stated just word for word as it was. It was simply understood that he would leave the buildings.”

But an examination of the record shows that Mrs. Callow was mistaken as to what Mr. Craft testified. We are unable to find any testimony of Mr. Craft in relation to the agreement as to whether the buildings should remain on the ground or not. During the examination of Mr. Craft, counsel for respondents asked the following question: “At the time of the signing of that instrument or at any time thereafter, was it agreed that the buildings erected by the contractee in that instrument (exhibit 2) might be removed by him and be his own personal property?” By Mr. Troy: “I object to that

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as being incompetent, irrelevant and immaterial." The objection continued for other reasons. By Mr. Vance: "I think the former part of the objection is well taken, but I do not understand the latter part of it." The question was then withdrawn, and counsel proceeded to examine the witness in relation to the value of the buildings. But the subject of the understanding at the time the contract was entered into was not resumed. Nor was there any other testimony on the subject worthy of attention. So that the case must stand squarely upon the temporary or permanent character of the structures.

It is also contended by counsel for respondents that it is a well-settled principle that even if things are of such character that they may be taken to be trade fixtures, if there be a new lease contract made between the landlord and tenant, or if there be a change in ownership and possession and a new contract made between the tenant and the new landlord, without mention and reservation, the things remaining upon the land are recognized by the new parties as part of the realty and attaching thereto. And that, inasmuch as the defendant in this case attorned to the new landlord after the sale to him of the premises by Mrs. Callow, this rule would apply to this case. Counsel cite, to sustain that rule, the case of *Carlin v. Ritter*, 68 Md. 478, 13 Atl. 370, 16 Atl. 301, 6 Am. St. 467. The rule laid down in that case was that, where the tenant had received notice to quit at the end of current year and did not do so, but after the expiration of the year obtained and accepted from the landlord a written lease of the premises "together with all the rights, appurtenances and privileges thereunto belonging or in any wise appertaining," but containing no reservation of the right to remove the fixtures then on the premises, the tenant would be estopped from removing such fixtures at the end of or during the life of the second lease. This was on the theory that the tenant's right to remove was considered rather a privilege allowed him than an absolute right to things themselves; that, inasmuch as they were not

removed before the expiration of the lease or during the time in which he had a right to remove them, he accepted them as the property of the landlord when he accepted the second lease; and that the right to possess the land and the fixtures as part of the realty vests immediately in the landlord at the expiration of the lease; the court saying in this connection:

“Although the landlord has no right to complain if the land be restored to him in the same plight it was before he made the lease, yet if the land is suffered to return to him with additions and improvements, even by forfeiture or notice to quit, he has a right to consider them as part of his property. Nor is this any injustice to the tenant; since it is his own fault if he suffers the land to return to the landlord with the fixtures annexed. This rule had its foundation in the presumption of abandonment, arising from the conduct of the tenant in quitting the premises, and leaving his fixtures behind him; . . .”

In that case it was said by the court:

“Here the tenancy by the year was put an end to at a definite period by the notice to quit, and the tenant was left in no uncertainty as to when his term would expire.”

This principle is also noticed in 1 Tiffany, Modern Law of Real Property, § 240, where it is said:

“If the tenant takes a new lease, without any stipulation on the subject, he loses, by perhaps the weight of authority, the right to remove the fixtures.”

But whatever may be said of the justice of this rule, it can have no application to the case at bar, where there was no notice to quit and no cessation for any length of time of the right of the tenant to maintain his lease.

We are unable, under any view of the law or of the facts, to determine that the respondents had any right whatever to recover. The judgment will therefore be reversed.

ELLIS, CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9308. Department Two. July 13, 1911.]

SEATTLE MERCHANTS ASSOCIATION, *Appellant*, v. GERMANIA
FIRE INSURANCE COMPANY OF NEW YORK, *Respondent*.¹

APPEAL—REVIEW—FINDINGS. Findings upon conflicting and irreconcilable evidence will not be disturbed on appeal.

INSURANCE — FIRE INSURANCE — INVENTORY. A refusal, after repeated demands, to furnish an inventory of goods, damaged but not destroyed, as required by a fire insurance policy, where it might have been done, defeats any action on the policy, although an inventory was furnished later after it was too late to be of any use.

SAME—PROOF OF LOSS. Failure to furnish proofs of loss within the sixty days required by a fire policy, without any excuse for the delay, forfeits all rights under the policy; and it is not a sufficient excuse that the company had been demanding an inventory, required by the policy to be given forthwith, without making specific mention of the proofs of loss.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 19, 1910, upon findings in favor of the garnishee defendant, after a trial on the merits before the court without a jury, in a garnishment proceeding. Affirmed.

Ira Bronson, for appellant.

Granger & Clarke, for respondent.

ELLIS, J.—Appellant sought to garnish a debt which it alleged to be due from respondent to the defendant H. S. Davidson, arising from a loss sustained by him under a policy of insurance which it is conceded was issued to him by respondent on June 26, 1908, insuring him in the sum of \$2,000 against loss by fire to certain store furniture and fixtures, and a general stock of merchandise such as is usually kept for sale in a retail grocery store. It is also conceded that a loss by fire to the property covered by the policy was suffered on March 15, 1909. Respondent denied liability on

¹Reported in 116 Pac. 585.

the grounds, that the assured failed to furnish a certain inventory as required by the policy; that the assured failed to make proofs of loss within sixty days as required by the policy; that there was not a total loss, and in so stating in the proofs finally made, the assured forfeited the policy for fraud. A jury being waived, the cause was tried to the court. Findings of fact and conclusions of law were made and judgment rendered discharging the garnishment. Thereupon this appeal was taken.

The policy of insurance contained the following provision:

"If fire occur the insured shall give immediate notice of any loss thereby in writing to this company, protect the property from further damage, forthwith separate the damaged and undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon; and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire, the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all encumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any change in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of the fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged; and shall also, if required, furnish a certificate of the magistrate or notary public (not interested in the claim as a creditor or otherwise, nor related to the insured) living nearest the place of fire, stating that he has honestly examined the circumstances and believes the insured has honestly sustained loss to the amount that such magistrate or notary public shall certify."

The court found, among other things, that the insured property was not wholly destroyed by the fire; that valuable

salvage remained; that the stock was left in such condition that a complete inventory and check could have been made; that the insurance company, through its agents, repeatedly demanded that assured furnish an inventory of the stock so that representatives of the company could check over the remains and determine the amount of stock in the premises at the time of the fire; that assured repeatedly refused to furnish the inventory as demanded, until May 7, 1909, when an inventory, though not such as required by the policy, was furnished; that immediately on receiving the inventory the adjusters of the insurance company went to the place of the fire and found all of said property gone and the ground absolutely bare; that the company at no time has had an opportunity under the terms of the policy to determine the amount of loss sustained by reason of the fire. The court further found that the assured refused to furnish proofs of loss as demanded until more than sixty days after the fire, and that the insurance company and its adjusters acted openly and fairly and in no way sought to evade any honest obligation arising under the policy by reason of the admitted fire.

The evidence is so conflicting as to the extent of the loss as to be hopelessly irreconcilable. The court found that the loss was not total but that valuable salvage remained. No useful purpose would be served by reviewing the evidence on this point in detail. We have examined the record with great care, and we are satisfied that this finding is supported by a clear preponderance of the evidence. This court has frequently held that findings of the trial court will not be disturbed where the evidence is conflicting and irreconcilable. *Palmer v. Washington Securities Inv. Co.*, 43 Wash. 451, 86 Pac. 640; *Helphrey v. Strobach*, 13 Wash. 128, 42 Pac. 537; *Skeel v. Christenson*, 17 Wash. 649, 50 Pac. 466.

The principal controversy seems to have arisen concerning the furnishing of the inventory required by the insurance company. The appellant complains that the agents and adjusters of the company demanded an itemized inventory of

the whole stock, while the policy only required that the damaged goods be separated from the undamaged goods and an inventory be made of the same. If, as a matter of fact, the whole stock was left in such condition after the fire as to make it possible, the terms of the policy would require a complete inventory of the whole stock. The language used in the policy is, "separate the damaged from the undamaged personal property, put it in the best possible order, make a complete inventory of the same, stating the quantity and cost of each article and the amount claimed thereon . . ." The court found that the stock was left in such condition that a complete inventory and check could have been made. On this point the evidence is very conflicting. The adjuster, Penfield, and the agent of the company, Weeks, both testified that they visited the scene of the fire two or three days after it occurred, and that it was in such condition at that time that one familiar with the stock could have made a complete inventory. The adjuster, Keller, who visited the scene a week or ten days afterwards, testified that, at that time, it was still in such condition as to permit a complete inventory. On the other hand, the assured and his wife both testified that such a thing would have been impossible. Mr. Davidson, however, was so badly burned that he did not visit the scene until over two weeks after the fire, and his wife says that she saw the place the night of the fire but made no examination until the health officers ordered that the premises be cleaned up. One J. C. Dare testified that he saw the premises next day and he considered it a total loss, but his testimony shows that he made no very careful examination. We believe the evidence as a whole was sufficient to warrant the court's finding that a complete inventory and check could have been made.

Two or three days after the fire, the special agent and adjuster, Penfield, went to the home of the assured with the local agent of the insurance company. He testified that he explained that an inventory was necessary to an adjustment,

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using, he says, the following language: "Well, now we will have to have an inventory. We have to separate the damaged from the undamaged goods, and that is the way to proceed." The assured also testified that "something of that kind was said." The assured was then not able to attend to the matter personally, but his wife, who was thoroughly familiar with the stock and had aided him daily in the store and in making a prior inventory, said she thought she could do it. Penfield offered to assist her in making a complete inventory of the stock but the assured would not permit it, saying that the matter was in the hands of Mr. Baxter, his attorney. On the same day Penfield and Weeks saw Baxter and demanded an inventory of the property with the cost price and amount of damage. Penfield testified as to this conversation as follows:

"He said he didn't have to do anything of the kind; they had a total loss out there and he would not do anything." . . .

"I said 'that may be very well, but we have got to have that to proceed; there is no use of having any trouble here; that is what we require; if you cannot do that, why, just read over the conditions of the policy and see what it says and follow that—be governed by that.' "

The record is replete with evidence of demands for an inventory, which were met with refusal, both by the assured and his attorney, but never, so far as we are able to discover, on the ground that the inventory demanded was not such as was called for by the policy. Finally, some fifty-two days after the fire, an inventory purporting to be a partial inventory of the entire stock and fixtures was furnished. It was then too late to be of use. Two adjusters for the company went to the scene of the fire and found the ground bare. The policy contained a further provision for arbitration in the event of disagreement as to the amount of the loss, and that the company may at its option take all or any of the articles at the ascertained or appraised value. The obvious purpose of the provision for an inventory is to aid in determining the value

of the stock and the amount of the loss, to make the basis for an adjustment, and in the event of disagreement, to lay the foundation for arbitration and appraisement. While provisions of this character will be strictly construed as against the insurer, they cannot be wholly ignored. We cannot agree with those courts which hold such provisions merely directory. The assured seems to have assumed that he alone had the right to determine that the loss was total, and refused in any way to aid the insurer to ascertain the actual value of the stock or the value of the salvage. His attitude is fairly expressed by this court in *Ward v. National Fire Ins. Co.*, 10 Wash. 361, 38 Pac. 1127, in reference to a refusal to furnish certain invoices required by the policy. The court said:

“And it is not for the assured in the face of such an agreement, to determine that because he cannot furnish all the proof that is required, he will refuse to furnish any, or refuse to aid the insurers in any way in determining questions that are of vital importance to them in the case. In fact, the insured seems from the start to have cavalierly settled this question, both for himself and the other party to the agreement. He stated in his correspondence that he could not see what would be gained in furnishing these data, if it were possible; then announces that he furnished what he supposed would be conclusive evidence that at the time of the fire he had more goods than the insurance called for, evidently resting upon the proof that he had furnished outside of this requirement. It might have been conclusive evidence, but, inasmuch as he and the appellant had stipulated what kind of evidence should be required, it was his duty to furnish that evidence if possible, and as far as possible.”

See, also, *Astrich v. German-American Ins. Co.*, 131 Fed. 13; *Providence Washington Ins. Co. v. Wolf* (Ind. App.), 72 N. E. 606.

It is admitted that the proofs of loss were not made until more than sixty days after the fire, but appellant contends that these proofs were waived by the insurance company. The principal evidence relied upon as proving a waiver is the

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frequent demands made for an inventory without specific mention of the formal proofs. The attorney for assured testified: "The inventory was the only thing they were asking for all along the line. I thought the task was over when we furnished that." It seems, however, that he realized that the formal proofs would be required, since he, without further demand, procured them, though after the time fixed by the policy. If such an inventory as the insurance company demanded had been furnished in time to have been of any practical use there might be some merit in this contention. As it was refused, we find none. There is no evidence of such unfair dealing on the part of the insurer or of attempts to deceive the assured as is found in *Sidebotham v. Merchants' Fire Ass'n*, 41 Wash. 436, 83 Pac. 1028. In this matter, as in the matter of the inventory, the assured seems to have assumed to settle the rights of all parties for himself.

This court is committed to the rule that a failure of the assured to furnish the proof of loss within the sixty days fixed by the policy, without sufficient excuse, forfeits his rights under the policy. *Davis v. Pioneer Mut. Ins. Ass'n*, 44 Wash. 532, 87 Pac. 829; *Davis v. Northwestern Mut. Fire Ass'n*, 48 Wash. 50, 92 Pac. 881.

The findings of the court are sustained by the evidence. They are amply sufficient to support the judgment which is therefore affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9423. Department Two. July 13, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. LESTER T.
BLAINE, *Appellant*.¹

STATUTES—TITLE—SUFFICIENCY. The title "an act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime and repealing certain acts," is broad enough to include § 2290 of Rem. & Bal. Code, providing that it shall be competent to show the former conviction of witnesses either by record, cross-examination or other evidence; since the title and act manifest an intention that it shall take the place of previous enactments and procedure, even though a former statute had been construed to require proof by record.

WITNESSES—CROSS-EXAMINATION—CRIMINAL LAW — PRIVILEGE OF ACCUSED—EVIDENCE OF FORMER CONVICTION. It is not a violation of the constitutional guaranty of a fair trial that the court compelled the accused on cross-examination to testify to a former conviction, under Rem. & Bal. Code, § 2290, providing that it shall be competent in a criminal proceeding to show the former conviction of a witness by cross-examination, where the jury were instructed that evidence of a former conviction could be considered only for the purpose of determining the weight to be given to his testimony.

HOMICIDE — SELF-DEFENSE — INSTRUCTIONS. Where the deceased was shot by the accused just after taking a bottle of whiskey from the accused, upon learning that the accused had given his son whiskey, an instruction as to the law of self-defense in case of a felonious assault is properly qualified by a statement that the rule is different when the attack is not felonious in character, when there is no real or reasonable apprehension of death or great bodily harm.

HOMICIDE — SELF-DEFENSE — APPEAL—HARMLESS ERROR—INSTRUCTIONS. An instruction clearly and correctly stating the defendant's right to take life in the defense of person and also of his property against robbery is not prejudicial from the fact that parts of it were not applicable to the facts of the case.

HOMICIDE — SELF-DEFENSE — ROBBERY — APPLICATION OF STATUTE. Rem. & Bal. Code, § 2416, warranting the repulsion of a robbery by force, even to taking life, is not applicable where the deceased was only guilty of a trespass in taking a whiskey bottle away from the accused after learning that the accused had given his son whiskey, and with no intent to commit a robbery.

¹Reported in 116 Pac. 660.

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Opinion Per CHADWICK, J.

HOMICIDE—FIRST DEGREE MURDER—INSTRUCTIONS—PREMEDITATION. It is proper to instruct that premeditation means "thought over beforehand" for any length of time however short, but that no particular space of time need intervene between the intent to kill and the killing.

CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Upon a charge of murder, an erroneous instruction as to premeditation is harmless where the jury found that there was no premeditation, and convicted defendant of murder in the second degree.

SAME. On a trial for murder, it is harmless to instruct as to first and second degree assault, which may not be included in the charge, where the defendant requested the instructions, and where the jury found a verdict of murder in the second degree.

HOMICIDE—DEGREES OF OFFENSE—INSTRUCTIONS AS TO LESSER OFFENSES—STATUTES. Under Rem. & Bal. Code, § 2595, if a homicide is neither excusable nor justifiable, it must at least be manslaughter, and the purpose of the code is to do away in homicide with instructions submitting lesser degrees of statutory offenses.

WITNESSES—CROSS-EXAMINATION—DISCRETION. It is not an abuse of discretion to refuse unlimited repetition in cross-examination, after inquiry of sufficient length to elucidate the fact as far as the witness is able to detail it.

Appeal from a judgment of the superior court for Whitman county, Pickrell, J., entered November 10, 1910, upon a trial and conviction of murder. Affirmed.

J. T. Brown, for appellant.

Paul Pattison and *F. L. Stotler*, for respondent.

CHADWICK, J.—Defendant was charged with murder in the first degree, and convicted of murder in the second degree. The defense was that the killing was justifiable, and the first error assigned is that the court erred in overruling a motion for a directed verdict at the close of the state's case. This assignment will need no discussion other than that which follows. The testimony of the state was ample to carry the case to the jury.

It is next insisted that the court erred in compelling defendant to admit, when on the stand as a witness in his own behalf, that he had been convicted of a crime and had been an inmate of the penitentiary in the state of Kentucky. It is

contended that the defendant was thus deprived of a fair trial, in violation of the guaranty of the state constitution, and further that the act of 1909 (Rem. & Bal. Code, § 2290), is unconstitutional and void. This contention is based upon the former statute (Rem. & Bal. Code, § 2722), as construed by this court, it being insisted that we had declared a rule of evidence, in that a former conviction of a felony could be shown only by the record of a judgment of a court of competent jurisdiction, and that the title of the criminal code of 1909, Laws 1909, p. 890, "An act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime, and repealing certain acts," is not broad enough to include § 2290, being the section of the criminal code which governed the lower court. This section is as follows:

"Every person convicted of a crime shall be a competent witness in any civil or criminal proceeding, but his conviction may be proved for the purpose of affecting the weight of his testimony, either by the record thereof, or a copy of such record duly authenticated by the legal custodian thereof, or by other competent evidence, or by his cross-examination, upon which he shall answer any proper question relevant to that inquiry, and the party cross-examining him shall not be concluded by his answer thereto."

We think the title is sufficient. It was the evident intention of the legislature, manifested not only by the title of the act but by the comprehensiveness of the act itself, to which were added general and specific repealing clauses, that the criminal code should stand in the place of all previous enactments as well as the former procedure, whether defined by the statutes or declared by the courts. As was said in *Marston v. Humes*, 3 Wash. 267, 28 Pac. 520, where the title, "An act relating to pleadings in civil actions, and amending §§ 76, 77 and 109 of the Code of Washington of 1881," was under consideration:

"Again, it would hardly be contended that it is not competent under the provision in question for the legislature to

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enact as a single law a code of civil procedure, and that an act entitled 'An act to provide a code of civil procedure' would be invalid, yet under this subject innumerable subheads and subjects can easily be carved out. Such title is good because the legislature has seen fit to take a comprehensive subject which can properly cover all of such subjects. If the legislature can thus by a name sufficiently comprehensive embrace all the subjects properly relating to civil procedure, it must follow that by adopting a subject sufficiently general it can embrace in one act all the statute law of the state. In other words, the legislature may adopt just as comprehensive a title as it sees fit, and if such title when taken by itself relates to a unified subject or object, it is good, however much such unified subject is capable of division."

See, also, *State v. Tieman*, 32 Wash. 294, 73 Pac. 375, 98 Am. St. 854.

In the absence of a statute, most courts have held that a former conviction can be shown only by a written copy of the judgment, and that oral evidence, either independent or by cross-examination of the defendant, will not be received. But this rule has almost everywhere been altered, either by statute such as the one now complained of, or by the changing viewpoint of the judges. Lord Chief Justice Ellenborough, in *Rex v. Castell Careinion*, 8 East 77, said:

"It cannot seriously be argued that a record can be proved by the admission of any witness. He may have mistaken what passed in court, and may have been ordered on his knees for a misdemeanor; this can only be known by the record."

This is criticized by Mr. Wigmore as a refinement of apprehension bordering on the ridiculous. 2 Wigmore, Evidence, § 1270. Judge Cooley, in *Clemens v. Conrad*, 19 Mich. 170, states the rule to be as follows:

"We think the reasons for requiring record evidence of conviction have very little application to a case where the party convicted is himself upon the stand and is questioned concerning it with a view to sifting his character upon cross-examination. The danger that he will falsely testify to a conviction which never took place, or that he may be mistaken

about it, is so slight, that it may almost be looked upon as purely imaginary; while the danger that worthless characters will unexpectedly be placed upon the stand, with no opportunity for the opposite party to produce the record evidence of their infamy, is always palpable and imminent."

But aside from the statute, we do not conceive the reception of such evidence, when limited as it was by the court, who said that "such evidence of his conviction in Kentucky can only be considered by you for the purpose of determining the weight to be given to the testimony of the defendant, and for no other purpose, and should not be used or considered by you for any other purpose or in any other manner whatever in arriving at your verdict," is a violation of any constitutional guaranty. Wharton, Criminal Evidence, § 489; 8 Ency. Plead. & Prac., 117.

The evidence tended to show, that defendant had given a son of the deceased liquor out of a bottle which he then had; that this coming to the notice of the deceased, he undertook to, and did, take the bottle away from defendant just before the fatal shot was fired. The defendant testified that the deceased attacked him with the bottle, and that he shot in self-defense, believing himself to be in danger of great bodily harm. The evidence introduced by the state tended to show that deceased did not assault defendant with the bottle, or at all. Accordingly the defendant submitted a further defense grounded on Rem. & Bal. Code, §§ 2406, 2414, 2418. It is contended that, if a person kill another in defense of his person, or one who is in the act of committing a robbery from the person, it is justifiable. It is upon this latter defense defendant believed his motion for an instructed verdict should have been granted. The court instructed the law of self-defense, and unnecessarily, as we believe, went further and said:

"But the rule is different when the attack is not felonious in character, that is, when from the attack there is no real or reasonable apparent danger of death or great bodily harm to

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the assailed. A person assailed has no right to take the life of his assailant even if he believes his own life in danger when the assault is without a weapon of any kind and when there is no reasonable ground for the belief by the person attacked that his person is in imminent danger of death or great bodily harm, but that an ordinary battery is all that is intended and all that he has reasonable ground to fear from the acts of his assailant, while a person is not bound to retreat and may lawfully repel a threatened assault and to that end may use force enough to repel the assailant, yet he has no right to repel a threatened assault with naked hands by the use of a deadly weapon in a deadly manner, unless he honestly believes and has reasonable grounds to believe that he is in imminent danger of death or great bodily harm. However, an assault with the naked fist is sufficient to justify killing in self-defense if there is at the time a reasonable apparent purpose by the assailant to inflict death or great bodily harm upon assailed, and if the latter at the time believes and has reasonable grounds to believe that he is in imminent danger of death or great bodily harm at the hands of the assailant, supposing that the person assailed acts reasonably and as a reasonable man under the circumstances, as such circumstances at the time in good faith appear to him."

It is complained, that the instruction is a comment on the evidence; that it, in effect, tells the jury that deceased was without a weapon of any kind, whereas defendant had testified that, after the deceased had taken the bottle from him, he had assaulted him with it; and that it is contradictory of the former and admittedly correct instructions of the court. We are of the opinion that the statement "that the rule is different when the attack is not felonious in character; that is, when from the attack there is no real or reasonable apparent danger of death or great bodily harm to the assailed," is a proper qualification to be made in submitting the defense here set up. The court had defined the term "felonious" as well as the word "assault," and from these definitions the jury must have understood that resistance of an assault to the extent of taking human life would not be justifiable unless the assault was made with evil or criminal intent, for it is not

every assault or a taking of property from the person that will justify the taking of human life. The instructions complained of were evidently taken from the case of *State v. Churchill*, 52 Wash. 210, 100 Pac. 309, they having passed the objections there made; and while we agree with counsel for defendant that the parts quoted are not applicable to the facts of the case at bar, yet they cannot be held to be prejudicial, for the court very clearly defined the right of defendant as to the extent to which he could defend not only his person, but also his property, against a robbery. Upon this point, the court said:

“You are instructed that if you find from the evidence that the defendant did shoot and mortally wound James O. Silvey in the actual resistance of an attempt on the part of the deceased to take from the possession of the defendant a bottle of whiskey, the property of defendant, by force and violence, then you should find the defendant not guilty;”

thus going, as we believe, beyond the law, at the request of, and in behalf of, defendant. It is not every chance altercation over property, as this affair was, that comes within the intent and design of the statute. Rem. & Bal. Code, § 2416, warrants the repulsion of a robbery by force, even to killing; but the act must bear the ear marks of that crime. We find no such intent on the part of the deceased. His act was a trespass—an impulsive demonstration on the part of a father who had sought to destroy rather than asport that which had been used, as he believed, to debauch his son.

It is also complained that the following instruction:

“Premeditated means thought over beforehand, for any length of time, however short. When a person after deliberation once forms a design to take human life, after ample time and opportunity for deliberate thought, then no matter how soon the felonious killing may follow the formation of the settled purpose, it will be murder in the first degree. Premeditated malice exists when the intention unlawfully to kill is deliberately formed in the mind and the determination thought over and reflected upon before the fatal blow is struck

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(no particular space of time, however, need intervene between the formation of the intent to kill and the killing) ;”

is vicious within the rule of *State v. Rutten*, 13 Wash. 203, 43 Pac. 30. But we do not so read the cases. The court did not, as in the *Rutten* case, tell the jury that the thought and act must concur in time, but was careful to say that premeditation means “thought over beforehand,” and if they found that there was previous thought, that the execution of the design might follow immediately thereafter. The instruction complained of is the general rule of law, and has been expressly sanctioned by this court in the case of *State v. Bridg-ham*, 51 Wash. 18, 97 Pac. 1096. But in any event the error, if it could be held to be an error, would not avail defendant, as the verdict of the jury indicates that it found that there was no premeditation. *Ross v. State*, 8 Wyo. 351, 57 Pac. 924; *Downing v. State*, 11 Wyo. 86, 70 Pac. 833, 73 Pac. 758.

The court defined assault in the first degree and assault in the second degree as included crimes, and submitted to the jury verdicts covering these crimes. It is assigned as error that these crimes are not included in the charge of murder in the first degree, and that defendant is therefore entitled to a new trial. This assignment is not well taken; for although the crime of assault in the first degree and assault in the second degree may not, under §§ 140, 141, and 143 of the Laws 1909, p. 930 *et seq.*, so-called criminal code (Rem. & Bal. Code, §§ 2392, 2393, 2395), and under the facts as developed at the trial, be included in the crime charged (*State v. Pepoon*, 62 Wash. 635, 114 Pac. 449), and had the court of its own motion submitted these verdicts, a conviction of either of the offenses, assault in the first or assault in the second degree, would have resulted in an arrest of judgment (*State v. Kruger*, 60 Wash. 542, 111 Pac. 769), the error was harmless, (1) because we find from the record that defendant requested that the crimes of assault be defined, and that such

verdicts be submitted to the jury; and (2) the jury did not find the defendant guilty of either degree of assault, but of the crime of murder in the second degree, thus indicating that it did not find the killing to be justified so as to permit a verdict for anything else than manslaughter. We believe it will not be out of place to say in this opinion that the evident design of the so-called criminal code was to change the former rule and practice of the courts in submitting as crimes included in the charge of homicide all the varying degrees of statutory and common law crimes against the person, down to and including simple assault. It may have been that it was the intention of the framers of that document to compel convictions for the crime charged and proven and to avoid compromise verdicts. At any rate, as the law now is, a homicide other than those specified in Rem. & Bal. Code, §§ 2392 to 2394, not being excusable or justifiable, is manslaughter. Rem. & Bal. Code, § 2395. It is not our province to deal with the policy of these statutes. It is enough that they have been written by the legislature, and the instructions of trial courts in criminal cases cannot be too carefully prepared with reference to the present code.

It is also complained that the court erred in refusing to permit defendant's counsel to further cross-examine a witness for the prosecution. It is said:

"The defense had a right on cross-examination to ask any question which would tend to test the accuracy or veracity of the witness, and cross-examination is as important to test the accuracy of testimony as its truthfulness or credibility, and prejudice will be presumed when this right is denied, and where a man is being tried for his life, certainly the right to determine through the medium of cross-examination the exact knowledge of the witness or the accuracy of his statements, should not be denied him." *State v. Rutten, supra.*

All rules of evidence must be measured by reference to the particular case. When the subject of examination has been fairly inquired into and rehearsed upon cross-examination, to a length sufficient to attain the object sought, and elucidate

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the fact so far as the witness is able to detail it, it will not be held to be an abuse of discretion on the part of the trial court to refuse the right of unlimited repetition on the part of counsel or the witness. When stopped by the court, counsel was interrogating the witness upon a subject which had been fully inquired into. In the *Rutten* case inquiry had been denied. In the case at bar, the ruling of the court is sustained by *State v. Coates*, 22 Wash. 601, 61 Pac. 726; *Nunn v. Jordan*, 31 Wash. 506, 72 Pac. 124; *State v. Roller*, 30 Wash. 692, 71 Pac. 718; *Fleischner v. Brewer*, 21 Wash. 6, 56 Pac. 840. Other errors are assigned, but are fully covered by what we have said in this opinion.

Judgment affirmed.

DUNBAR, C. J., ELLIS, MORRIS, and CROW, JJ., concur.

[No. 9376. Department Two. July 13, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. ROBERT J.
GIBSON, *Appellant*.¹

RAPE—EVIDENCE—CORROBORATION—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 2443, providing that no conviction shall be had for rape and other sexual crimes upon the testimony of the prosecutrix unless supported by other evidence, requires evidence from an independent source having a tendency to connect the accused with the crime; although the same act repealed Rem. & Bal. Code, § 2155, requiring, in prosecutions for rape and seduction, corroborating evidence tending to "convict the defendant" of the offense; the intention being to extend the rule to other crimes than rape and seduction, rather than to abrogate the former rule.

RAPE—EVIDENCE—CORROBORATION—SUFFICIENCY. Upon a prosecution for rape, evidence that the prosecutrix started for the place where she claims to have met the defendant at the time of the offense, is not sufficient corroborating evidence to sustain a conviction within Rem. & Bal. Code, § 2443, requiring the testimony of the prosecutrix to be supported by other evidence, where no one testified to taking or seeing her there, or that she and the defendant were at any time isolated from others.

¹Reported in 116 Pac. 872.

SAME. Proof of acquaintance and opportunity is not sufficient corroborating evidence to sustain a conviction of rape, within Rem. & Bal. Code, § 2443, requiring the testimony of the prosecutrix to be supported by other evidence, where other young men had intimate acquaintance with her and more ample opportunity.

SAME. In a prosecution for rape, where another had been first charged with the offense and offered to marry the girl and officers sought to secure evidence against him, the fact that such party was warned by the accused and advised to leave the state, does not show an attempt by the accused to fix the crime upon another or constitute sufficient corroborating evidence to support a conviction under Rem. & Bal. Code, § 2443, requiring the testimony of the prosecutrix to be supported by other evidence.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered June 9, 1910, upon a trial and conviction of rape. Reversed.

Lambert & Jeffers and C. C. Upton, for appellant.

Daniel T. Cross, for respondent.

ELLIS, J.—The appellant was convicted of the statutory crime of rape committed upon the person of Violet May Leighton, a female child under the age of fifteen years, and appeals from the judgment and sentence of the court. Insufficiency of the evidence to sustain the verdict, and an alleged improper instruction given by the court, are assigned as error. It is urged that the testimony of the prosecutrix was not corroborated as required by the statute, Rem. & Bal. Code, § 2155, which is cited and quoted by both appellant and the state as the controlling statute, and which reads as follows:

“No conviction shall be had for the offense of rape, or seduction, in this state upon the testimony of the female raped, or seduced, unless it is corroborated by such other evidence as tends to convict the defendant of the commission of the offense.”

Neither in the briefs nor in argument was there any intimation that this statute had been repealed or modified, but both briefs and the entire argument were based upon and

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directed to the above quoted section. The section discussed by counsel was repealed by § 52 of the Penal Code of 1909, page 906, being § 2304 of Rem. & Bal. Code. The present corroborative requirement in cases of rape and other sexual crimes is found in § 191 of the Penal Code of 1909, page 946, being Rem. & Bal. Code, § 2443, which is as follows:

“No conviction shall be had for violation of any of the foregoing provisions of this chapter upon the testimony of the female upon or against whom the crime was committed, unless supported by other evidence.”

This section, however, in order to have any force, must be construed as requiring corroborative evidence of the same character as that required by the repealed section. The other evidence in support of the testimony of the female must support her testimony upon the main facts; namely, that the crime was committed and that the accused was the person who committed it. Under neither statute could it be held that corroboration or support of her testimony could be found in other evidence which supports her testimony only on immaterial or irrelevant matters. The obvious purpose of the new section is to extend the requirement of corroboration to other sexual crimes beside rape and seduction, not to abrogate or change the rule as to those two crimes. The law still requires other evidence than the testimony of the female corroborating her in the main facts, otherwise her testimony would not be “supported by other evidence.” Such other evidence must still emanate from an independent source and have some tendency to connect the accused with the crime.

There is no question in this case that the crime was committed by some one about the latter part of June, 1909. The prosecutrix gave birth to a matured child on March 17, 1910, the end of the period of gestation from June preceding. The prosecutrix testified that the appellant, on the morning of Monday, June 19, or 20, 1909, went upstairs in her father's house, with a light, before daylight, and committed the crime

while she was in bed with her two sisters aged six and four years, and while her two older sisters were downstairs getting breakfast. It is urged that there is an inherent improbability in this since these were near the longest days of the year, when daylight began not long after three o'clock in the morning, and that it is hardly credible that other members of the family would be up and about their daily cares at or before that hour; that the case therefore calls for a rigid application of the rule of corroboration required by the statute. Both the father and an older sister of the prosecutrix testified that the family never arose so early.

The prosecutrix had lived for some two years in the family of one Jeff Killian, consisting of himself, his wife, and two sons, Bill and John, aged respectively twenty-two and twenty years. She slept in a room between that occupied by Killian and his wife and the bedroom of the two young men. The three rooms were connected by doorways with curtains instead of doors. She testified that she went to her father's home, seven miles from the Killian's, the Sunday night before the crime was committed, and that the appellant and her older sister, Alice, brought her back to the Killian home Tuesday night about ten o'clock. Both her father and her sister Alice testified that prosecutrix was not at her father's home at all during the month of June, but visited there in the month of May, 1909.

The corroborating or supporting circumstances relied upon by the state are all found in the testimony of Jeff Killian and Mrs. Killian. They are as follows: (1) The testimony of Mr. and Mrs. Killian that prosecutrix went to the home of her father on a Sunday between the middle and the last of June, 1909, and Mrs. Killian's testimony that appellant and her sister Alice brought her home about ten o'clock on the following Monday night. Neither of them nor any one testified to seeing prosecutrix at her father's house or to taking her there. This evidence, however, does to a degree corroborate her testimony that she was at her father's home about the time

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she claims, and that she was in company with the appellant within a few days of the time when, in the nature of things, the crime must have been committed. No one, however, testified that the two were ever at any time isolated from others.

(2) The testimony of Killian and wife that the appellant, who was brother-in-law to the prosecutrix, was on terms of friendly familiarity with her and on several occasions visited the Killian home for no apparent reason except to see her, on which visits he romped and played with her and with the Killian boys and with Killian himself. There is no evidence that he was ever alone with her on these occasions, nor evidence of what the witnesses considered improper conduct prior to the offense, except that on one occasion he, the prosecutrix, her older sister Florence, and a Mrs. Lindsey, her relative, sat and reclined upon a bed at the same time; that at a certain pioneer's picnic he, the prosecutrix, and Florence went up on a hill above the crowd but in plain view and watched a ball game, which the Killians did not think looked well as the girls were wearing short dresses. These things established the fact of a familiar and intimate acquaintance, and with the Killians' testimony as to the visit of the prosecutrix to her father's home above referred to, are at most corroborative only in showing acquaintance and possible opportunity to commit the crime. This is not sufficient corroborative evidence within the meaning of the statute. "It has often been held that mere proof of acquaintance and opportunity will not satisfy the requirements of such a law." *State v. Jonas*, 48 Wash. 133, 92 Pac. 899; *State v. Kissock*, 111 Iowa 690, 88 N. W. 724; *State v. Chapman*, 88 Iowa 254, 55 N. W. 489; *State v. Wheeler*, 116 Iowa 212, 89 N. W. 978, 93 Am. St. 236; *State v. Burns*, 110 Iowa 745, 82 N. W. 325; 3 Ency. of Evidence, 680. This is especially true where, as in this case, two other young men had an intimate acquaintance with prosecutrix and more ample opportunity. *State v. Smith*, 54 Iowa 743, 7 N. W. 402.

(3) As further support of the testimony of the pros-

ecutrix, it is claimed that the appellant sought to fix the crime upon John Killian. There is no evidence, however, that this charge originated with the appellant. The father of prosecutrix testified that, early in January, 1910, John Killian came to him and asked his consent to marry her. The father demurred because of the girl's youth, but his suspicions were aroused, and at the first opportunity he questioned her, with the result that she admitted her condition and charged John Killian with the crime. Alice Leighton also testified that she was present and heard this. This statement to the father and sister was at the trial denied by the prosecutrix. The father further testified that shortly afterwards he sent his son and the appellant to consult an attorney as to whether a marriage would be legal, and they returned with the information that the attorney said the girl was too young for a valid marriage. Apparently, subsequent to this, John Killian told the father that if he could not marry her he would leave the country. It is admitted that soon afterwards John Killian did leave, and at the date of the trial had not returned and his whereabouts were unknown. Jeff Killian, father of John, testified that the appellant came to his home the latter part of January and told him that the prosecutrix had been home and charged John with the offense, and appellant advised him to get John out of the country; that it was "a penitentiary crime and the old man is going to put the law on him"; that he would spend money on it before he would let it run into the law. Mrs. Killian testified that when she learned of these things she wrote to John what the appellant had said. It also appears that, when the condition of prosecutrix became known, the officers of Grant county at first sought to secure evidence against John Killian. It appeared that the appellant wanted to marry Florence, one of the older sisters of prosecutrix, and this, together with the fact that John Killian had offered to marry prosecutrix, is urged as a reason why appellant desired to prevent the matter getting into

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court. It is also claimed that the motive of prosecutrix in accusing the appellant was to protect her lover, John Killian, and it is true she was at least willing to marry him. Such evidence has been held admissible to show motive. *Curby v. Territory*, 4 Ariz. 371, 42 Pac. 953.

This evidence fails to show a deliberate effort on the appellant's part to fix the crime upon another. It also falls far short of the corroborating circumstances found in *State v. Jonas, supra*, cited by the state. In that case the accused wrote his wife advising her to induce the prosecuting witness to leave the state, and also confessed to other acts which in themselves would constitute the crime. The contrast is marked.

The case of *State v. Katon*, 47 Wash. 1, 91 Pac. 250, is not applicable. In that case the trial and conviction occurred prior to the passage of the act of 1907 requiring corroboration and when no such provision as that found in § 2443 existed.

"The crimes of rape and assault with intent to commit rape, as has often been said, are easily charged and difficult to disprove. The just indignation felt by all right-thinking persons when a bestial assault has been made upon a girl predisposes jurors to accept as sufficient any evidence which, to their minds, tends to connect the accused with the commission of the crime. It was with the very purpose of protecting those who might be accused of such crimes from conviction without satisfactory evidence of guilt that the statutory provision was enacted, and it is our duty to apply the statute without hesitation, and give to it its reasonable interpretation, regardless of the effect which may result from its application in any particular case." *State v. Egbert*, 125 Iowa 448, 101 N. W. 191.

So long as we have a statute requiring corroboration or other evidence to support the testimony of the female in such cases we are compelled to observe its requirements. The evidence offered in support must have some real supporting force. It must be something more than a colorable support. *State v. Powell*, 51 Wash. 372, 98 Pac. 741; *State v. Stewart*,

52 Wash. 61, 100 Pac. 153; *State v. McCool*, 53 Wash. 486, 102 Pac. 422, 132 Am. St. 1089; *State v. Crouch*, 60 Wash. 450, 111 Pac. 562.

We have been cited to no authority which, under a statute such as ours, would sustain a conviction on evidence so remotely corroborative as that presented here, and by a thorough search we have failed to find any. The conclusion which we have reached as to the evidence makes it unnecessary to consider the court's instructions. The judgment is reversed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9474. Department One. July 14, 1911.]

*In re Guardianship of HARRIET ERVAY.*¹

INSANE PERSONS—APPOINTMENT OF GUARDIAN—PROCESS—WAIVER—APPEARANCE. In proceedings for the appointment of a guardian for an incompetent person, appearance in person and by attorney cures any defect in service of process.

INSANE PERSONS—APPOINTMENT OF GUARDIAN—APPEARANCE BY PROSECUTING ATTORNEY. Rem. & Bal. Code, § 1624, provides that in proceedings for the appointment of a guardian of an incompetent person, it shall not be necessary for the prosecuting attorney to appear at the hearing, if the incompetent is represented by an attorney of his own selection; hence, in such case, an appearance by the prosecuting attorney is unnecessary.

INSANE PERSONS—APPOINTMENT OF GUARDIAN—EVIDENCE OF INCOMPETENCY. A guardian should be appointed for an incompetent person where it appears that she was the victim of designing persons who obtained all her ready cash, and a general power of attorney, and large sums of money, and that her considerable fortune will be taken from her unless her affairs are conducted through the courts.

Appeal from orders of the superior court for Snohomish county, Black, J., entered September 23, 1910, appointing a guardian for an incompetent person and allowing fees and

¹Reported in 116 Pac. 591.

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expenses in maintaining the proceedings, after a hearing before the court. Affirmed.

Peters & Carr and *T. B. McMartin*, for appellant.

G. D. Eveland, for respondent.

PER CURIAM.—On July 12, 1910, the superior court of Snohomish county, on the petition of Evaline Chase, appointed James Brady guardian of the person and estate of Harriet Ervay, an incompetent person, directing that letters of guardianship issue to him on his giving a bond conditioned as required by law in the sum of thirty-two thousand dollars. The bond was furnished, and subsequently the trial court made a further order allowing the petitioner witness fees, costs, and counsel fees, expended and incurred in maintaining the proceedings. This appeal is from the orders so made.

Counsel for the appellant first questions the proceedings by which the alleged incompetent was brought into court, but these, in so far as the record in this court discloses, were sufficiently regular. Proper citation was issued and personally served, and the alleged incompetent appeared in person and by attorneys of her own selection and opposed the appointment of a guardian. The appearance alone would cure any defect in the manner of service, if any such existed.

It is also objected that the prosecuting attorney made no appearance in the proceedings. But it was not necessary that the prosecuting attorney appear under the circumstances shown here. The statute expressly provides that nothing therein "shall prevent the minor, insane or mentally incompetent person from appearing by an attorney selected by himself, or by some one on his behalf, in which case it will not be necessary for the prosecuting attorney to appear at the hearing." Rem. & Bal. Code, § 1624. In this case, as we have said, the mentally incompetent person did appear by attorney selected by herself.

On the merits of the controversy it has seemed to us that it would serve no useful purpose to review the testimony at any

length. Mrs. Ervay seems unable to resist the blandishments of those who approach her professing an interest in her spiritual welfare. She first became a victim of a so-called spiritual medium, who soon possessed himself of all her ready cash and a power of attorney from her authorizing him to transact her general business. It was only by the interference of her family that the influence of the person over her was counteracted and the management of her property returned to her own hands. Later she met with a discredited baptist preacher who succeeded in obtaining from her large sums of money, ostensibly for church work, but which seem to have been largely retained by the preacher for his own private use. These, with other matters appearing in the record, make it clear to our minds that unless the management of her affairs is conducted through the courts her considerable fortune will be taken from her and she will become either a charge on the bounty of her relatives or a ward of the state. The orders appealed from should be affirmed, and it is so directed.

[No. 9672. Department One. July 14, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Roy Moorehead, Plaintiff*, v. W. O. CHAPMAN, *Judge, etc., Respondent.*¹

BAIL—PERSONS ENTITLED—PENDENCY OF APPEAL. Upon a trial for murder, in which the defendant is acquitted of first degree murder by a verdict for manslaughter, the defendant is entitled to bail pending his appeal, under Rem. & Bal. Code, § 1747, providing that bail must be fixed in all criminal actions except capital cases.

BAIL—ORDER FOR—EFFECT OF APPEAL—STAY. Appeal by the state from an order fixing bail does not operate as a stay of proceedings, in the absence of statute so providing; and the court has jurisdiction to and must accept bail pending the appeal, in view of Rem. & Bal. Code, § 1731, providing that on appeal the superior court retains jurisdiction for all purposes not affected by the appeal.

¹Reported in 116 Pac. 592.

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Opinion Per MOUNT, J.

Application filed in the supreme court July 6, 1911, for a writ of mandate to compel the superior court for Pierce county, Chapman, J., to approve a bail bond pending appeal from a criminal prosecution. Granted.

Lefebvre & Foss, for plaintiff.

J. L. McMurray and *G. C. Nolte*, for respondent.

MOUNT, J.—Mandamus to compel the trial court to approve a bail bond in a criminal case pending appeal. The relator was charged with the crime of murder in the first degree. He was tried and found guilty of manslaughter, and he appealed from the judgment pronounced thereon. The trial court thereupon fixed his bail in the sum of \$8,000 pending the appeal. A bond satisfactory to the trial judge was furnished, but before the judge approved the bond, the state served and filed a notice of appeal from the order allowing bail. The court thereupon refused to approve the bond, or to proceed further. Relator thereupon applied to this court for a writ to compel the trial judge to approve a bail bond and permit the relator to be released from custody.

The statute provides that:

“In all criminal actions, except capital cases in which the proof of guilt is clear or the presumption great, upon an appeal being taken from a judgment of conviction, the court in which the judgment was rendered, or a judge thereof, must, by an order entered in the journal or filed with the clerk, fix and determine the amount of bail to be required of the appellant.” Rem. & Bal. Code, § 1747.

See, also, Rem. & Bal. Code, § 2310; Const., art. 1, § 20.

It is plain that the relator was entitled to bail because, having been acquitted of the charge of murder in the first degree, he could thereafter be tried for no greater offense than manslaughter (*State v. Murphy*, 13 Wash. 229, 43 Pac. 44), which is a bailable offense. The trial judge was apparently of the opinion that, when the order was made fixing bail and the state appealed therefrom, the court was then

without jurisdiction to proceed further. It is apparent, however, that the court retained jurisdiction to make the order for bail effective, for the statute provides, at Rem. & Bal. Code, § 1731, that,

“The superior court shall, nevertheless, retain jurisdiction for the purpose of all proceedings by this act provided to be had in such court, and for the purpose of settlement and certifying the bills of exceptions and statements of facts, and for all purposes in so far as the cause is not affected by the appeal.”

In the absence of a statute providing for a stay, the mere notice of appeal does not operate to stay the proceedings. The respondent does not claim that there is a statute providing for such stay. No stay, therefore, exists. The constitution and the statutes provide for bail in cases like this. Relator is entitled thereto as of right. Surely the relator may not be deprived of his liberty, when he has complied with the statute and offered the bond required by an order of the court, simply by the prosecuting attorney's giving a notice of appeal from such order. To hold that he may, would be to defeat the plain mandate of the statute. We are satisfied that the approval of the bond and the discharge of relator under the same did not affect the order appealed from, and were, therefore, within the jurisdiction of the court, notwithstanding the appeal.

Relator argues that the order fixing bail in this case is not appealable by the state. We need not decide that question now, because, if we assume that the order is appealable, we are still satisfied that the notice of appeal did not operate as a stay, and that the trial court did not lose jurisdiction to approve the bond and release the relator from custody pending the appeal.

The peremptory writ is therefore ordered as prayed.

DUNBAR, C. J., GOSE, PARKER, and MORRIS, JJ., concur.

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Opinion Per DUNBAR, C. J.

[No. 9199. Department One. July 14, 1911.]

MARY HARVEY *et al.*, Respondents, v. TACOMA RAILWAY &
POWER COMPANY, Appellant.¹

TRIAL—INSTRUCTIONS—REQUESTS—DAMAGES—MINIMIZING LOSS — CARRIERS. Where the court had instructed the jury generally that a passenger (suing for damages for failure to perform the contract of carriage) is bound to do everything in her power to reduce the damages and cannot complain of consequences flowing from her refusal to do so, it is not error to refuse a request for a more particular instruction on the subject dealing with the particular circumstances of the case.

DAMAGES—EXCESSIVE VERDICT—CARRIERS — BREACH OF CONTRACT. Where plaintiff sued for \$1,950 damages resulting from a sprained knee in being compelled to transfer in the dark at an unsuitable place, and in being kept out all night in a street car in the winter time, a verdict for \$500 will not be set aside as excessive where the testimony of a physician and disinterested parties indicate that the jury was not controlled by passion or prejudice.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered March 25, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for personal injuries sustained by a passenger of a street car in making a transfer to another car. Affirmed.

B. S. Grosscup and *W. C. Morrow*, for appellant.

Fitch & Jacobs, for respondents.

DUNBAR, C. J.—This is a personal injury action. The appeal is from a verdict rendered and judgment entered in the superior court of Pierce county on March 24, 1910. Mrs. Harvey, one of the respondents herein, is a woman about sixty years of age, who resides at Woodland Station on the old Puyallup electric line, about ten miles from the city of Tacoma. The appellant is a corporation operating, among other lines, the electric street car system known as the "old Puyallup Line." The complaint alleged, in substance, that

¹Reported in 116 Pac. 644.

on the evening of December 17, 1909, the respondent Mary Harvey boarded a car known as the "Woodland Tripper," leaving Tacoma about 5:30 p. m.; that the defendant company proceeded with said car upon which said plaintiff was a passenger to a point about four miles from the Tacoma terminus of its line of street railway, at a place called Midway, where said car stopped, and the conductor in charge informed the passengers that all who were bound to destinations beyond Fern Hill should get off said car and take a car ahead; that in obedience to said request, plaintiff Mary Harvey got off said car and attempted to board the car ahead; that said change of passengers was made not at a regular stopping point, and was a difficult and unsuitable place to make a transfer of said passengers; that the night was dark and plaintiff was unable to see, and in making said transfer seriously sprained and injured her knee, which has caused her much pain and suffering; that upon boarding the car ahead, instead of the car proceeding through to its and plaintiff's destination, it was run in the reverse direction, back toward Tacoma, to Alki Switch, a distance of about one-third of a mile, where it was sidetracked by the defendant company, and there remained during the entire night of December 17 and 18, 1909, notwithstanding plaintiff and other passengers upon said car repeatedly requested and urged the employees of defendant in charge of the car to take them, either through to their destination, or back to the city of Tacoma, where they might secure some reasonable accommodations; but that defendant arbitrarily and without cause refused to either proceed with said car to its destination or to run it back to the city of Tacoma, but kept plaintiff and other passengers out in the car along the line of said street railway for a period of about nineteen hours, without any shelter other than said street car, and without any fire, food or drink, and exposed to the inclemency of the winter night. The complaint further avers that the action of the street car company was wilful, and that the employees in

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charge of the car were in no way interfered with or prevented by any act of man or God from performing its obligation as a common carrier; that they refused to proceed with the car, and that by reason of the failure to carry the plaintiff to her destination, she was injured in divers and sundry ways to the extent of \$1,950.

The answer of the appellant denied the essential allegations of the complaint, averred that it had made every possible effort and exercised the highest degree of care in endeavoring to operate its electric railway cars on said night; that the operation of the car had been interfered with by an unlawful assemblage or mob of persons of great numbers; that the crews of its cars were overpowered and driven from their posts and intimidated with threats and violence; that it had appealed to the police authorities of the city of Tacoma without success; and in short that it was guilty of no negligence or disregard of the contractual rights of the plaintiff. The reply denied the affirmative matters of the answer, and on the issues thus presented the case came to trial.

The circumstances attending the stoppage of this car at Alki Switch were set forth at length in the case of *Leclaire v. Tacoma R. & Power Co.*, 62 Wash. 157, 113 Pac. 268, and it is not necessary to repeat them here. We held in that case that it was the duty of the company to transport its passengers, notwithstanding the fact that in doing so it would be compelled to carry a few passengers for a less amount than the company deemed it was entitled to. Upon the submission of this cause to the jury, a verdict was rendered in the sum of \$500. Three assignments of error are presented: (1) Refusal of the court to direct a verdict for appellant; (2) refusal of the court to give its requested instruction number 12; and (3) refusal of the court to grant appellant's motion for a new trial.

We do not think that the refusal of the court to direct a verdict for appellant was error. There was ample testimony, if the jury believed it, to sustain a verdict. The appellant

asked the court to instruct the jury that, if they found from the evidence that the plaintiff could have returned to the city of Tacoma on the defendant company's cars, after she found that defendant was unable to operate its cars past Midway Station, and that she could then have gone to her home by another line of street railway which was being operated regularly upon the night in question, or that she could have remained over night in Tacoma with friends or elsewhere, and that she was requested and urged by its employees to return to the city of Tacoma, and that they would provide a car to take her back to the city of Tacoma if she would consent to go, but that she wilfully refused such offers and declined to return to the city of Tacoma, she could not recover from the defendant for such injuries as may have resulted to her by reason of the fact that she remained all night in the car aforesaid. On the proposition of whether defendant was invited or requested to take a car back to Tacoma, the testimony is conflicting, and hence the appellant had the right to have this instruction given to the jury, or some instruction in reference to the duty of the defendant to minimize her damages. But the court did, among other things, instruct the jury as follows:

"It is the duty of a plaintiff in a case of this sort to do everything in her power to minimize the damages and, if the plaintiff refuses to reduce or minimize the damages to the utmost of her ability, she cannot complain in law against any consequences flowing from or resulting from such a refusal if any which would not have occurred except for such refusal."

This court has uniformly held that the trial court cannot be compelled to give instructions in any particular form of words; but that if the principle involved in the instruction which is asked for is given by the court, that is sufficient. And we think that the plain and explicit instruction given by the court on the question of the duty of the defendant to minimize her damages, presented to the jury the duty of

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Statement of Case.

the plaintiff in this respect, and that such an instruction is less liable to lead to confusion in the minds of a jury than an instruction that undertakes to deal with particular circumstances.

It is earnestly insisted that the court should have granted appellant's motion for a new trial on the ground that the verdict was so excessive as to indicate passion and prejudice on the part of the jury. An examination of the record in this case convinces us that we would not be justified in interfering with the verdict of the jury in this respect. This action was brought for \$1,950. The plaintiff was allowed only \$500. Her testimony and that of disinterested parties, including the physician who waited upon her, convince us that the jury was not controlled by passion or prejudice in assessing the damages.

There appearing to be no reversible error in the record, the judgment is affirmed.

PARKER, GOSE, and MOUNT, JJ., concur.

[No. 9483. Department One. July 14, 1911.]

EFFIE GREEN, *Appellant*, v. McLAUGHLIN REALTY COMPANY
et al., *Respondents*.¹

VENDOR AND PURCHASER — REMEDIES OF VENDEE — DAMAGES FOR BREACH OF CONTRACT — PLEADING — COMPLAINT — SUFFICIENCY. A complaint by a vendee for damages states a good cause of action, when it alleges the vendor's contract to pave certain streets, its breach of the contract, and damage therefrom, and damages from defendant's failure to construct in a workmanlike manner, certain improvements which it was its duty to construct, and that plaintiff would have paid installments due except for defendant's breach, the same being a sufficient excuse for nonpayment.

Appeal from a judgment of the superior court for King county, Carey, J., entered March 22, 1911, upon sustaining

¹Reported in 116 Pac. 641.

a demurrer to the complaint, dismissing an action on contract. Reversed.

H. A. P. Myers and *Walter L. Johnstone*, for appellant.

Frank A. Paul, and *Robt. F. Booth*, for respondents.

DUNBAR, C. J.—This is an action for damages under a contract for the sale of real estate. The contract and complaint are too long to be set forth at length here, but the complaint, among other things, alleges, that defendants and each of them have violated the covenants and provisions of said contract, in this, to wit, that they and each of them failed and neglected to pave the street abutting upon the property mentioned in said contract within one year from October 3, 1906, as provided in said contract, or at all, and that said street has never yet been paved; that the cement sidewalks, sewers, and water mains which have been put in were and are of the cheapest kind, and the workmanship and material were cheap and shabby and insufficient to serve the purposes for which they were intended; that the reasonable cost of paving said street in front of and abutting said property is the sum of about \$600, and the paving of the street in front of said lots, if made at the time specified in said agreement, would have increased and enhanced the market value of said lots in the sum of at least \$1,000; that the damage to said property on account of poor work and material in the cement sidewalks and sewers and water main was and is the sum of \$500; that if the defendants had caused said street to be improved, as agreed upon in said contract, the plaintiff would have paid, or caused to be paid, the full installments as and when they became due according to said contract; that the plaintiff did not make the payments that are now due, according to the strict terms of said contract, for the sole reason that the improvements had not been made thereon, as agreed by defendants, and on or about October, 1907, defendants notified the plaintiff that they did not

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intend to make further improvements upon said property; that if said improvements had been put in at the time and as specified in the contract, plaintiff could have sold said property at a profit of at least \$1,000 over and above the purchase price; that plaintiff paid \$150 at the execution of the contract, and thereafter various other amounts, aggregating the sum of \$1,265. These are the main averments of the complaint, but other incidental averments were made to make the proper connection in the complaint with the averments set out. The court sustained a general demurrer to the complaint. The plaintiff electing to stand upon her complaint and refusing to plead further, judgment of dismissal followed, from which this appeal is taken.

The only question to be considered, therefore, is the sufficiency of the complaint. The demurrer, of course, confesses all the allegations of the complaint which are properly pleaded. The appellant relies upon the case of *Crampton v. McLaughlin Realty Co.*, 51 Wash. 525, 99 Pac. 586, 21 L. R. A. (N. S.) 823, which was a case against the respondents in this case, and an action of rescission on a contract exactly like the one involved in this case. The respondents contend that that case is not controlling in any manner, the fact that one of the parties was the same and that the contract was the same being purely incidental. It cannot be said that the sufficiency of the complaint in this case is controlled by the case cited, but that case does decide that the action which has been commenced in this case is the proper form of action, viz., an action for damages. But we think that the complaint plainly states a cause of action. It alleges a contract and the breach thereof by the defendants, and the damages which resulted to the plaintiff from such breach; alleges that the defendants contracted to pave certain streets abutting upon the property, and that they failed to do so; that sidewalks, sewers, and water mains, which under the contract it was the defendants' duty to construct, had not been constructed in a workmanlike manner, and that

damages resulted therefrom. We think that the allegation in the complaint that the plaintiff would have paid or caused to be paid the full installments which, under the contract, she was to pay when they became due, if defendants had caused said street to be improved, was the pleading of a sufficient excuse for her seeming default in not making such payments.

The judgment will be reversed, with instructions to overrule the demurrer.

FULLERTON, GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9545. Department One. July 14, 1911.]

E. E. BROCKHAUSEN, *Appellant*, v. NATHAN TOKLAS,
Respondent.¹

ASSIGNMENTS—CAUSE OF ACTION—NEGLIGENCE OF ASSIGNEE—DILIGENCE—RIGHTS AND DUTY OF ASSIGNOR—DAMAGES—MINIMIZING. Where a half interest in claims for services was assigned to the co-owner for the purposes of collection, and attorneys were jointly employed and paid by the assignor and assignee, and suit commenced, the assignor had as much right to control the suit as the assignee, and it became his duty, when the assignee left the state and failed to diligently prosecute the suit, to minimize his damages by assuming control of the suit and recovering therein, or in a new suit in his own behalf; and he cannot recover damages from the assignee for negligence in allowing the suit to be dismissed for want of prosecution on the ground that the claims are barred by the statute of limitations.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered December 7, 1910, upon granting a nonsuit, in an action in tort. Affirmed.

Moye Wicks and *Harris Baldwin*, for appellant.

William S. Lewis, for respondent.

GOSE, J.—In January, 1907, the plaintiff and the defendant were asserting claims against one Kemp and one Schuler,

¹Reported in 116 Pac. 668.

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Opinion Per Gose, J.

for considerable sums of money, which they claimed were due them under the terms of a written contract for services performed and money expended between April, 1898, and July, 1905, in conducting certain mining litigation in the states of Washington and Idaho. On January 17, 1907, the plaintiff assigned his claim to the defendant, for the purpose of enabling the latter to sue in his own name on both claims and thereby save the expense of prosecuting separate suits. The assignment recites that one-half of any judgment recovered in the action shall belong to the plaintiff. The plaintiff kept a copy of the assignment. Thereafter and in February, 1907, the defendant commenced two actions in the superior court of Spokane county, one against Kemp and the other against Schuler, upon his own and the assigned claim. A short time after he commenced the actions, he left Spokane, and the cases were dismissed upon the motion of the defendants on March 24, 1909, for want of prosecution.

On March 16, 1907, on the motion of the defendant, the court directed the plaintiff to file a bill of particulars in the Schuler case. The order was not complied with. Neither the plaintiff in this case nor counsel for Toklas in the cases against Kemp and Schuler, was able to locate Toklas after July, 1907. On July 2, 1907, Toklas wrote the plaintiff that he would soon be in Eastern Washington. The plaintiff and Toklas' attorney used due diligence, both by inquiry and by writing letters, to locate Toklas, but were not thereafter able to do so. The first they knew of his whereabouts after July, 1907, was in the month of May, 1910, when they found him in Spokane. This action was commenced in September, 1910, for the purpose of recovering from the defendant the amount which the plaintiff claims is due him from Kemp and Schuler. The complaint alleges, in addition to the facts stated, that the plaintiff's claims against Kemp and Schuler are barred by the statute of limitations. At the close of the

plaintiff's evidence, a judgment of nonsuit was entered, and he has appealed therefrom.

The basis of his claim is that the respondent, by accepting the assignment and commencing the action, became his agent for the prosecution of the suits, and that he is liable to the appellant for his negligence in failing to do so. There can be no doubt that there was an implied agreement upon the part of the respondent to use due diligence in the prosecution of the actions. In failing to do so, he was guilty of negligence. It is also elementary that, when the appellant discovered that the respondent had absented himself and was not prosecuting the actions, it became his duty to minimize the damages. The principal cannot remain supine after he discovers the nonaction of his agent, and hold the latter liable for the damages which he, by the exercise of reasonable diligence, could have prevented. The appellant and the respondent had jointly employed counsel to prosecute the cases, and each of them had paid one-half the retainer and one-half the jury fees and advance costs. The appellant, therefore, had as much right to direct the attorney as had the respondent. It was the duty of the former to cause the cases to be brought to trial, or to be dismissed so that he could prosecute his own case. His only excuse for failing to proceed with the trials is that he needed the respondent as a witness in the case. He testified that the respondent "had to corroborate a good many of my accounts and that I had to corroborate a good many of Mr. Toklas' accounts," and that he "was relying on the testimony of Mr. Toklas and on my own testimony in the case." It is obvious that, if he can establish his claim against Kemp and Schuler in this action with the respondent as a hostile party, he could have proven his case in the other suits or, upon their dismissal, in suits which he himself could have prosecuted without the aid of the respondent as a witness. Of course, there can be no liability upon respondent in any event, unless the appellant has a valid claim against Kemp or Schuler, one or both. Those

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claims are the basis of this action. It is admitted that Kemp and Schuler are men of large means, and have at all times been financially able to respond to any judgment that might be obtained against them.

We think that the failure of the appellant to pursue the course indicated precludes a recovery in this action. He assigned his claims for the purpose of the suits, and could have at any time resumed control over them. In other words, he could have terminated the agency or could have directed his attorney to proceed to trial. What recourse he would have had against the respondent, if the cases had gone against him in whole or in part, we need not determine. Moreover, the allegation that the actions were barred when this suit was commenced is not supported by the evidence. The record shows that the services were rendered and the money expended between April, 1898, and July, 1905, under a written contract, and that the cases were dismissed in March, 1909.

The judgment is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9587. Department One. July 14, 1911.]

CHARLES H. COLLINS, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

MUNICIPAL CORPORATIONS—PRESENTMENT OF CLAIMS—CONTENTS—REASONABLENESS OF REQUIREMENTS. Rem. & Bal. Code, § 7995, requiring a claim in tort against a city to state the claimant's residence, by street and number, at the time of filing of the claim, and for six months prior to its accrual, is reasonable.

SAME—WAIVER OF OBJECTIONS—PLEADING—ANSWER—ADMISSIONS. An answer admitting the filing and rejection of a claim against a city and denying all other allegations, does not waive the objection that the claim filed was insufficient.

SAME—OBJECTION TO CLAIM—CONDITIONS PRECEDENT TO ACTION. Objection to the sufficiency of a claim filed against a city need not

¹Reported in 116 Pac. 663.

be taken by plea in abatement, as the statute requiring the filing of the claim is mandatory and compliance is a condition precedent which must be alleged and proved.

SAME—EXCUSES FOR NONCOMPLIANCE. The fact that a claimant's residence was known to the city officials and the claim rejected on its merits, does not excuse the statement of such residence in a claim against the city, as required by statute.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered August 3, 1910, upon granting a nonsuit in an action for the death of plaintiff's son by reason of a defective city bridge. Affirmed.

Charles P. Lund and Del Cary Smith, for appellant.

Fred B. Morrill and V. T. Tustin, for respondent.

GOSE, J.—This is an action of tort against the city of Spokane. A judgment of nonsuit was entered against the plaintiff, and he has appealed. The complaint charges that the appellant's minor son lost his life in consequence of the negligence of the respondent in maintaining a foot bridge over the Spokane river without railings or other protection. The code (Rem. & Bal. Code, §§ 7995 and 7997), provides:

“Whenever a claim for damages sounding in tort against any city of the first class shall be presented to and filed with the city clerk or other proper officer of such city, in compliance with other valid charter provisions of such city, such claim must contain, in addition to the valid requirements of such city charter relating thereto, a statement of the actual residence of such claimant, by street and number, at the date of presenting and filing such claim; and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued.

“Compliance with the provisions of this act is hereby declared to be mandatory upon all such claimants presenting and filing any such claims for damages.”

The judgment of nonsuit was entered because the appellant had failed to comply with these requirements.

The appellant contends, (1) that the provisions of the

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statute are unreasonable and unconstitutional; (2) that they were waived; and (3) that it was competent to prove that the city had actual notice of his residence. We will consider these propositions in the order stated. This court is committed to the view that there is a common-law liability in this state against cities and towns for their torts in the performance or nonperformance of their municipal duties. *Hutchinson v. Olympia*, 2 Wash. Ter. 314, 5 Pac. 606; *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938. We have also held that reasonable legislative regulations for the presentment of claims against a city for a tort will be upheld (*Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383), and that unreasonable regulations will not be enforced. *Hase v. Seattle*, *supra*; *Jones v. Seattle*, 51 Wash. 245, 98 Pac. 743; *Wurster v. Seattle*, 51 Wash. 654, 100 Pac. 143; *Scherrer v. Seattle*, 52 Wash. 4, 100 Pac. 144.

It is contended that the provision requiring "a statement of the actual residence of such claimant by street and number at the date of presenting and filing such claim, and also a statement of the actual residence of such claimant for six months immediately prior to the time such claim for damages accrued," is an unreasonable restriction upon the rights of litigants, and therefore not enforceable under the rule announced in the *Hase* case. We cannot agree with this contention. As was said in *Johnson v. Troy*, 24 App. Div. 602, 48 N. Y. Supp. 998:

"It is frequently just as important to investigate the claimant as it is the claim."

In the *Hase* case a city ordinance requiring the claim to state the residence of the injured party for one year preceding his injury was held unreasonable. The statute, it will be observed, only requires the notice to state the residence at the date of presenting and filing the claim, and for six months immediately prior to the time the claim accrued. The line of demarkation between a reasonable and unreasonable regulation cannot always be defined with exactness. Like the line

which marks the limit of the police power, it must be resolved by a process of inclusion and exclusion rather than precise definition. While adhering to the view announced in the *Hase* case, we are not disposed to extend the doctrine there announced.

The appellant has cited *Born v. Spokane*, 27 Wash. 719, 68 Pac. 386, and *Bell v. Spokane*, 30 Wash. 508, 71 Pac. 31. These cases have no application. In the *Born* case it was held that mental or physical incapacity is a sufficient excuse for not giving notice of the claim within the time prescribed in the city charter. In the *Bell* case it was held that a clerical error in the jurat to the verification does not invalidate the notice. Statutory regulations of this character, if reasonable, violate no constitutional rights. 5 Thompson, Negligence, § 6322.

The complaint alleges:

"That within 30 days from said 2d day of September, 1909, the plaintiff filed with the city of Spokane, a claim for damages on account of the death of said William Henry Collins, as aforesaid, by reason of the negligence and carelessness of the defendant as hereinbefore stated, which said claim was rejected by said defendant and disallowed."

This is admitted in the answer, as follows:

"Admits that within thirty days from the said 2d day of September, 1909, the plaintiff filed with the city of Spokane a claim for damages on account of the death of the said William Henry Collins, which said claim was rejected by the defendant, and denies each and every other allegation of said paragraph four."

It is contended that this constitutes a waiver. Assuming, but not deciding, that the city may waive the provisions of the statute notwithstanding the mandatory provision, we do not think this amounts to a waiver. The appellant had presented a claim for damages, but it contained none of the statutory requirements. The complaint was demurrable and the demurrer would have admitted every fact admitted by the answer. The answer admitted the facts pleaded, but did not

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admit any fact not pleaded. *Durham v. Spokane*, 27 Wash. 615, 68 Pac. 383, and *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884, cited by the appellant, are not in point. It is urged that the action being for the enforcement of a common-law right, the failure to allege a compliance with the statute is available only by answer or plea in abatement. White's Supplement to Thompson on Negligence, § 6356, is relied upon in support of this view. The author states the rule as contended for, but cites only one case—*Bunker v. Hudson*, 122 Wis. 43, 99 N. W. 448—in support of the text. That case holds that the statute merely postpones the right to commence the action until the matters required by the statute have been performed, and that a failure to comply with the statute is strictly matter in abatement. It distinguishes in this respect between actions for tort at common law and the same class of actions resting upon a statute. We think the better rule is that a statute of this character is mandatory, and that a compliance with its provisions is a condition precedent to the bringing of the action. The giving of the notice in substantial compliance with the statute must be alleged and proven. 5 Thompson, Negligence, § 6321; *Gardner v. New London*, 63 Conn. 267, 28 Atl. 42; *Clark v. Tremont*, 83 Me. 426, 22 Atl. 378; *Mitchell v. Worcester*, 129 Mass. 525; *Bausher v. St. Paul*, 72 Minn. 539, 75 N. W. 745; *Engstrom v. Minneapolis*, 78 Minn. 200, 80 N. W. 962; *Lincoln v. Finkle*, 41 Neb. 575, 59 N. W. 915; *Lincoln v. Grant*, 38 Neb. 369, 56 N. W. 995; *Curry v. Buffalo*, 135 N. Y. 366, 32 N. E. 80; *Johnson v. Troy*, *supra*.

At common law no preliminary notice or demand was required before commencing an action against a municipal corporation for injuries resulting in consequence of its negligence. The bringing of the action was a sufficient demand. 5 Thompson, Negligence, § 6319. If the statute may require the injured party to file a claim stating the time, place, cause, and extent of the injury—and we have so held—it may require him to plead and prove a compliance therewith, as a

condition precedent to a recovery. This, we think, was one of the purposes of the statute.

The appellant offered to prove that the place of residence of the appellant was known to the officers of the city, and that the claim was rejected on its merits and not because of the failure of the appellant to give notice in conformity with the statute. The refusal to admit this testimony is assigned as error. The statute makes no exception in such cases, and there is nothing in the record to indicate that the appellant was misled by any act of the respondent. He merely failed to comply with the statute, and must bear the burden of his own inadvertence.

The judgment is affirmed.

FULLERTON and MOUNT, JJ., concur.

PARKER, J. (concurring)—I concur in the result reached by the majority opinion, but desire to state that I regard the real distinction between this case and that of *Hase v. Seattle*, 51 Wash. 174, 98 Pac. 370, 20 L. R. A. (N. S.) 938, to be that the requirement for filing the claim here involved is found in a state law, while in the *Hase* case the requirement was found in an ordinance of the city. I do not think the city has the power, by ordinance or charter, to require a claimant to state the place of his residence for any length of time prior to the filing of his claim, and that such a requirement would be unreasonable. I think this is what the *Hase* decision ought to mean and that it is what it does mean. This court has, to my mind, gone to the extreme in holding that cities may, by charter or ordinance, prescribe the conditions upon which they may be sued. It is only because of the rule of *stare decisis* that I now admit that such is the law. I think the doctrine of those holdings should in no event be extended, so far as the city's power is concerned in that regard. The practical result of that doctrine has enabled a party to a wrong, to wit, a city, to make substantive law by prescribing the conditions upon which it may be sued. Clearly, no other

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party to an action was ever accorded such a privilege, and it is to be remembered that the city's liability for a tort such as is here involved is that of any other party at common law, as is pointed out by the majority opinion. This being a state law, the test of reasonableness as applied to a city charter or ordinance does not apply. It might even be well argued that the legislature could entirely take away the right to sue a city, the same as it could withhold the right to sue the state.

DUNBAR, C. J., concurs for the reasons stated by PARKER, J.

[No. 9135. Department Two. July 14, 1911.]

M. P. FUHRMAN *et al.*, *Respondents*, v. INTERIOR WAREHOUSE COMPANY, *Appellant*.¹

LANDLORD AND TENANT—CROPPING ON SHARES—TENANCY IN COMMON. A tenancy in common in a crop is created by a lease of land to be cropped under a contract for a specific division of the crop.

TENANCY IN COMMON—ACTIONS—PARTIES—JOINDER. Tenants in common in a prospective crop have a joint right of action for damages through fraud in the sale of seed to one of the tenants.

DAMAGES—MEASURE OF DAMAGES—FRAUD—LOSS OF CROP. The measure of damages for the loss of a prospective crop through fraud in the sale of seed is the market value of such crop as plaintiff would have raised if the seed had been as represented, less the cost of producing or harvesting not incurred, and less the value, if any, of such crop as was raised from the seed sold; but where the plaintiff had not paid for the seed, the sum due therefor should also be deducted.

Appeal from a judgment of the superior court for Klickitat county, McMaster, J., entered April 5, 1910, upon the verdict of a jury rendered in favor of the plaintiffs for \$630, in an action for damages. Reversed, unless \$87.84 is remitted.

¹Reported in 116 Pac. 666.

F. D. Chamberlain and *E. C. Ward*, for appellant.

W. B. Presby, for respondents.

CROW, J.—Action for damages by M. P. Fuhrman and Frank L. Huston against the Interior Warehouse Company, a corporation. The complaint, in substance, alleges, that the plaintiff Frank L. Huston, being the owner of tillable land in Klickitat county, granted its possession to his co-plaintiff, M. P. Fuhrman, under a lease, by the terms of which Fuhrman agreed to pay Huston a rental of one-third of any and all crops grown thereon during the year 1909; that Fuhrman, with the intention of growing a crop of wheat hay, thoroughly plowed, cultivated, and prepared the land, and applied to defendant, Interior Warehouse Company, to purchase blue-stem wheat with which to seed the land; that he notified the defendant he wanted blue-stem wheat for seed; that defendant, so knowing his wants, needs, and purposes, sold him a variety of winter wheat known as “forty-fold,” which Fuhrman used in seeding, believing it to be blue-stem; that Fuhrman seeded the land in March and April, 1909; that forty-fold wheat is not adapted to, but is worthless for, spring sowing; that it will sprout, but will not mature or produce a crop; and that the plaintiffs, without fault on their part, lost their entire crop, to their damage in the sum of \$1,050. To this complaint, a demurrer was overruled, and the defendant answered. On trial the jury, in compliance with instructions of the trial court, divided the damages in the proportion of two-thirds and one-third, and returned a verdict in favor of Fuhrman for \$420, and in favor of Huston for \$210. The defendant has appealed from the final judgment entered thereon.

The demurrer was special and general, its grounds being, (1) a defect of parties plaintiff; (2) improper joinder of several causes of action; and (3) insufficient facts pleaded to state a cause of action. Appellant first assigns error on the order overruling the demurrer, and in substance contends

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that, as respondent Huston was the landlord of respondent Fuhrman, the alleged sale of wheat, if made to either, was made to the latter only; that no privity of contract exists between Huston and appellant; that Huston has no separate cause of action against appellant; that he and Fuhrman have no joint or common cause of action against appellant; and that they are improperly joined as parties plaintiff. The allegations of the complaint show Fuhrman was tilling the land upon an agreement to yield to Huston a specified portion of the crop raised. This made the respondents tenants in common in the crop. The weight of authority is that every contract, whereby use of land is given to a party to cultivate and return to the owner a specified portion of the crop produced, creates a tenancy in common in the crop, and that this is true whether the agreement between the parties is a lease or a mere cropping contract. The tendency of the courts is to hold that, whenever there is a provision in any form of contract for a specific division of crops produced, a tenancy in common arises therein. Freeman, Cotenancy and Partition (2d ed.), § 100; *Footte v. Colvin*, 3 Johns. 216, 3 Am. Dec. 478; *Putnam v. Wise*, 1 Hill 234, 37 Am. Dec. 309; *Aiken v. Smith*, 21 Vt. 172; *Smyth v. Tankersley*, 20 Ala. 212, 56 Am. Dec. 193; *Dinehart v. Wilson*, 15 Barb. 595; *Abernethy v. Uhlman*, 52 Ore. 359, 93 Pac. 936, 97 Pac. 540.

In *Smyth v. Tankersley*, *supra*, the court said:

“In the case of *Thompson v. Mawhinney*, *supra*, it was decided by this court that a contract made with the owner of land, which the other party agreed to cultivate and to divide the products equally with him, was not, technically speaking, a lease, but that a tenancy in common was created in the products. In the contract under consideration, the mode of compensation adopted repels the conclusion that it could have been the intention of the parties that the land should not be cultivated, and thus assimilates its terms more closely to the contract in the case last cited. It is true, the phraseology adopted is that which is usual in leases, but the substance of the agreement is to be regarded, rather than the words:

Putnam v. Wise, supra; and in contracts of this description, the true test seems to be, that wherever provision is made for dividing the specific products of the land, a tenancy in common results: *Putnam v. Wise, supra*, and authorities there cited."

Although the appellant sold the seed wheat to Fuhrman only, the sale was for the benefit of Huston as well. He was interested in the prospective crop. A sale of seed wheat unfit for use damaged him as directly and positively as it did Fuhrman. It caused him to lose the one-third which he was to receive for the use of his land, as completely as it caused Fuhrman to lose his two-thirds. In *Footte v. Colvin, supra*, it was held that the owner of land, and his lessee cultivating it on shares, have joint property in the crops and may jointly maintain an action against a third person who wrongfully cuts and removes them. If Huston and Fuhrman were both injured as the direct result of appellant's act in selling the latter seed wheat unfit for use, they, as tenants in common in the crop, have a joint cause of action against appellant for their damages sustained. The demurrer was properly overruled.

Appellant contends its motion for a nonsuit should have been granted. We have carefully examined the evidence and find that, although conflicting, it was sufficient to sustain the verdict of the jury on the issues of fact submitted, and that the nonsuit was properly denied.

The evidence introduced was sufficient to show that, for the joint benefit of Huston and himself, the respondent Fuhrman properly plowed, cultivated, and prepared the land for seeding; that he purchased the wheat, which he understood and appellant represented to be blue-stem, suitable for spring sowing; that Fuhrman used it to seed the land; that the crop did not mature sufficiently to justify the expense of harvesting; that it was not harvested for that reason, and that it was a total loss. It also appeared that the respondent Fuhrman had not paid appellant for the seed wheat purchased and used

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by him. On the measure of damages the trial court instructed the jury as follows:

"If you find from the evidence and a preponderance thereof, that plaintiff is entitled to recover from defendant, you will allow him such sum not exceeding \$1,050 as is equal to the market value of such crop as plaintiff would have raised upon his land if the wheat had been as represented by the defendant, less the cost of harvesting such crop and less the value, if any, of such crop as was raised that season upon the land planted with the seed alleged to have been sold to plaintiff by defendant."

Appellant contends this instruction was erroneous in that it stated an improper measure of damages. In *Shotwell v. Dodge*, 8 Wash. 337, 36 Pac. 254, this court held the proper measure of damages for a lost crop to be its market value less the cost of producing, harvesting and marketing the same. Here the respondent Fuhrman had incurred and paid all expense of cultivating, seeding, and producing a crop, aside from the cost of the seed wheat used, but he incurred no expense of harvesting. Expense or cost of producing the crop actually incurred by respondent Fuhrman should not be deducted from its market value, but such expense of producing and harvesting as he had not incurred should be deducted. The value of a probable crop upon the land was shown, and no expense of marketing should be deducted. The instruction was erroneous in that it failed to instruct the jury to deduct the cost of the seed wheat used which respondent Fuhrman had purchased from appellant and for which he had not made payment. Appellant claimed the seed wheat was not sold to Fuhrman, but to his mother. The jury, however, found the sale was made to the respondent, and the evidence sustains this finding. Appellant, in a communication made to Mrs. Fuhrman, claimed sales of the wheat in dispute were made for a total price of \$87.84, the highest value mentioned in the evidence. It is apparent that the only possible prejudicial effect of the instruction given and above quoted was to increase the damages to that extent.

Other objections are predicated upon rulings of the court on the evidence, and on instructions given or refused. We, however, find the record free from prejudicial error, except as above stated, and consider that we have discussed all controlling questions of law or fact arising on this appeal. As the only possible effect of the erroneous instruction above mentioned, prejudicial to the appellant, would be to increase the damages awarded to the extent of \$87.84, a new trial should not be granted, except at respondent's election. It is ordered that, if within twenty days after remittitur, the respondents file with the clerk of the superior court notice of their election to remit \$87.84 of the damages awarded, the judgment as thus modified be affirmed, and that otherwise a new trial be granted. The appellant will recover its costs in this court.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9353. Department One. July 14, 1911.]

JOHN T. NASSA *et al.*, *Appellants*, v. ARTHUR SEABORG *et al.*,
Respondents.¹

PUBLIC LANDS — BOUNDARIES — MEANDER AND HIGH TIDE LINES. Land below the government meander line, and above the line of high tide at the time of the admission of the state to the Union, is upland and passes with the government patent of the meandered upland.

Appeal from a judgment of the superior court for Wahkiakum county, Rice, J., entered July 15, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

N. H. Bloomfield (*E. S. Snelling*, of counsel), for appellants.

C. C. Dalton (*Herbert W. Meyers*, of counsel), for respondents.

¹Reported in 116 Pac. 658.

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PARKER, J.—The plaintiffs commenced this action to recover from the defendants a tract of land in Wahkiakum county bordering upon the Columbia river. A trial before the court without a jury resulted in findings and judgment in favor of the defendants, from which the plaintiffs have appealed.

Appellants claim title to the land under a deed from the state of Washington conveying to their predecessors in interest the tide and shore lands of the second class owned by the state in front of government lot 4 of sec. 13, tp. 8, N. R. 6 west, W. M. Respondents are in possession of the land in controversy, have made valuable improvements thereon, and claim title thereto under a patent from the United States conveying lot 4 to their predecessors in interest. The right of appellants to recover depends upon whether or not the land claimed by them and in possession of respondents was land belonging to the state at the time of its giving the deed under which appellants claim title. Upon this question the trial court found, in substance, that the land in controversy is a part of, and belongs to, the government lot 4; that it is all upland, situated above the line of ordinary high tide of the Columbia river and between that line and the government meander line; and that the tide and shore land described in the deed from the state, under which appellants claim title, does not include the land claimed by them in their complaint in this action. These findings are claimed to be erroneous, and constitute the principal ground of error relied upon by appellants for a reversal of the judgment.

The evidence renders it certain that in the year 1905, at the time of the giving of the deed by the state for the tide and shore land, under which appellants claim title, the land here involved was not tide or shore land, but was upland above the line of high tide and immediately below the government meander line of lot 4. The finding of the trial court that it is a part of government lot 4 must have been made upon the theory that it was upland at the time of the admission of the

state to the Union, and is, therefore, a part of lot 4, notwithstanding it is between the meander line of that lot and the line of high tide, under the decisions of this court in *Washougal etc. Transp. Co. v. Dalles etc. Nav. Co.*, 27 Wash. 490, 68 Pac. 74, and *Johnson v. Brown*, 33 Wash. 588, 74 Pac. 677. Upon the question of the exact condition of this land at the time of the admission of the state to the Union, the evidence is not at all satisfactory. If, however, it were not for the certainty existing as to the land being upland in 1905, and the growth of trees upon it indicating considerable age, we might be influenced by the testimony of some of the witnesses to regard it as being formed by accretion since the admission of the state; and such a view of the facts might lend some support to the state's title thereto and appellants' claim under the state's deed. Const., art. 17, § 1; Rem. & Bal. Code, § 6763; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632; *Welsh v. Callvert*, 34 Wash. 250, 75 Pac. 871.

A careful review of the entire record leads us to conclude that we would not be warranted in disturbing the trial court's finding that the land is a part of government lot 4, and that it therefore passed to respondents' grantors under the government patent for lot 4. *Washougal etc. Transp. Co. v. Dalles etc. Nav. Co.*, and *Johnson v. Brown*, *supra*.

Other contentions of counsel for appellants we think are without merit, and in any event are not such as would affect our disposition of the cause in respondents' favor upon the grounds we have discussed. Therefore, they do not call for further notice. We find no error. The judgment is affirmed.

DUNBAR, C. J., FULLERTON, GOSE, and MOUNT, JJ.,
concur.

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[No. 9532. Department One. July 14, 1911.]

THE STATE OF WASHINGTON, *on the Relation of J. A.
Dennison, Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

CARRIERS—REGULATIONS—FRANCHISE—FARES — LIMITS OF CITY — EXTENSION. A franchise limiting the fare that may be charged by a street railway company for a continuous passage between points within the city limits applies to the city limits as they may thereafter be extended by the annexation of new territory.

EVIDENCE—PAROL EVIDENCE—STREET RAILWAY FRANCHISE—EXPLANATION. An unambiguous franchise limiting the fare that may be charged by a street railway company for a continuous passage between points within the city limits cannot be varied or explained by parol evidence of a contemporaneous agreement that the limitation should not apply to territory that might thereafter be annexed to the city.

CARRIERS—REGULATION—FRANCHISE—FARES—CHARACTER OF ROAD. A city may grant a franchise for ordinary street railway service limiting the amount that may be charged for a continuous passage between points within the limits of the city, although the railway was an interurban line; hence, in litigation over the matter, it is not error to refuse to allow its interurban character to be shown.

Appeal from a judgment of the superior court for King county, Webster, J., entered November 22, 1910, upon findings in favor of the plaintiff, after a trial on the merits in a mandamus proceeding. Affirmed.

Morris B. Sachs and *Will H. Thompson*, for appellant.

Scott Calhoun and *H. D. Hughes*, for respondent.

PARKER, J.—The relator commenced this action in the superior court for King county to compel the Seattle, Renton & Southern Railway Company to carry passengers, upon payment of a five-cent fare, over its line of railway the entire distance between the southerly limits of the city of Seattle and the northerly terminus of the railway company's line in the

¹Reported in 116 Pac. 638.

business center of the city. A trial before the court resulted in a judgment against the railway company as prayed for. The railway company has appealed.

The facts upon which the rights of the parties rest may be briefly summarized as follows: The appellant railway company has, since long prior to the year 1907, owned and operated a line of railway, extending from the business center of Seattle southerly to the city limits and several miles beyond to the town of Renton. Prior to April, 1907, its line of railway within the city had been operated under franchises granted by the city over its streets. In April, 1907, the city passed a franchise ordinance which became operative and took the place of prior franchise ordinances under which appellant had maintained and operated its railway within the city. This new Ordinance was No. 15,919, and entitled: "An ordinance granting to William R. Crawford, his successors and assigns, a franchise to construct, maintain and operate a system of street railways in the city of Seattle." It was under the provisions of this franchise that the relator sued for and obtained the relief granted by the trial court in this action. After granting the right to maintain and operate "a street railway within the city of Seattle" upon certain designated streets extending from the business center of the city to the southern city limits, there is contained in, and made a part of, the franchise certain conditions and restrictions, among which are the following:

"FARES: The grantee, his successors and assigns, may establish and take a passenger fare or toll which shall not exceed the sum of five cents for a single continuous ride one way over any line or lines owned, controlled or operated by the grantee, his successors and assigns, between points situated within the city limits, of either the city of Seattle or the town of Columbia, although a transfer or transfers shall be necessary."

Appellant's railway passes for a short distance through the town of Columbia, between the business center and southern limits of the city, which accounts for the reference to the

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town of Columbia in this provision. In September, 1907, after the granting of this new franchise, there became annexed to and a part of the city of Seattle additional territory, bounding its corporate limits upon the south, through which annexed territory appellant's railway runs. The relator resides in, and has considerable property in, this annexed territory and near appellant's line of railway.

It is contended by counsel for appellant that the provisions in this franchise relating to the carrying of passengers for a five-cent fare between points within the city limits imposes no obligation upon it as to the amount of fare it may charge except within the city limits as they existed at the time of the granting of the franchise in April, 1907, and that that provision has no application to territory annexed to the city thereafter. It seems to us that our decision in the case of *Peterson v. Tacoma R. & Power Co.*, 60 Wash. 406, 111 Pac. 338, completely answers this contention. In that case it was held that a franchise provision restricting the amount of fare within the city limits which a railway company operating under such franchise might charge became applicable to territory thereafter annexed to the city, the same as to territory within the city at the time of the granting of the franchise. The provision here involved is no more favorable to appellant in this case than the provision in the *Peterson* case was to the railway company there affected. Indeed, when the two provisions are critically compared, this seems to even more plainly support the relator's contention. The question was critically reviewed in that case, and we deem it unnecessary to do more than refer to and reaffirm the views there expressed. Counsel for appellant insists, however, that this case is distinguishable from the *Peterson* case by reason of certain facts, which we will briefly notice.

Upon the trial, counsel for appellant offered oral evidence tending to show that, at the time of the granting of this franchise, it was understood between the city and the appellant that the five-cent fare limitation in the franchise should

not be held to apply to territory which might thereafter become annexed to the city. The facts thus sought to be proven consisted only of the oral discussions and negotiations between the representatives of the city and appellant, prior to the actual passage of the franchise ordinance. The exclusion of this evidence is claimed to be erroneous. We think the court was clearly right in this ruling. The provision restricting the amount of fare within the city limits to five cents is not ambiguous, and hence, not susceptible of explanation by oral evidence of negotiations leading up to its adoption by the contracting parties.

It is contended that appellant's line of railway is an interurban railway, and hence, not subject to the five-cent fare restriction of the franchise beyond the limits of the city as they existed at the time of the granting of the franchise by the city. It may be conceded that the railway is, and has been at all times, an interurban railway, in so far as it serves the public by carrying passengers to and from points outside of the city, and that as such a railway it cannot be controlled by the city or by this franchise as to the fare charged for such service. It does not follow, however, that the railway is not a street railway and subject to control as such by the city within the city limits, so far as the carriage of passengers within the city limits is concerned. If it is performing the service of an ordinary street railway under a franchise granted by the city, within the city limits, as to that service it is a street railway, though it may also be an interurban railway as to the service it renders in carrying passengers to and from points beyond the city limits. The franchise agreement was, as we have noticed, that within the city limits the fare "shall not exceed the sum of five cents for a single continuous ride one way over any line or lines owned, controlled or operated by the grantee." Indeed, under this agreement it would seem to be of no consequence what the technical nature of the railway may be. It is difficult to see why even an ordinary

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steam railway might not enter into such a contract and be bound thereby.

Counsel for appellant sought to bring into the case, by supplemental answer, the fact that the state railroad commission has assumed jurisdiction over appellant's railway, and made some regulations as to its service outside of the city limits. The trial court declined to notice this fact, evidently regarding it as immaterial, and declined to permit the filing of the supplemental answer so showing. This we think was without error. The purpose of appellant in bringing such fact into the cause was only to support its contention that its railway was an interurban railway. This, we have seen, was immaterial so far as the service of the railway here involved is concerned. Other contentions of counsel for appellant are disposed of by what we have already said, in so far as they require discussion.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9578. Department One. July 14, 1911.]

HOMER S. JONES *et al.*, *Appellants*, v. ULYSSES F. HAWK
et al., *Respondents*.¹

SPECIFIC PERFORMANCE—FRAUD—DILIGENCE—EVIDENCE—SUFFICIENCY. Specific performance of an agreement to trade lands, rescinded on the ground of fraud before the deal was finally closed, will not be decreed, when it appears that defendant was induced to pay \$32.50 per acre for land not worth over \$12, by false representations as to the character of the soil, that the purported owner thereof had no interest in the lands, that the agent assuming to advise the defendant was in the pay of the other side, and that defendant's only visit to inspect the land was made at its most favorable season before the soil began to show that it was not of the character represented.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered January 3, 1911, upon findings

¹Reported in 116 Pac. 642.

in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

F. W. Girand, for appellants.

Cullen, Lee & Foster, for respondents.

FULLERTON, J.—In the early part of the year 1910, the respondent U. F. Hawk, then owning certain real property situated in the city of Spokane, listed the same with Rogers & Rogers, real estate brokers, for sale. The matter was put in the hands of one R. H. Newman, who later on approached the respondent and informed him that he had a client who had a farm that he might exchange for his city property, and inquired of him whether he would consider such a proposition: and on his giving an affirmative answer, introduced him to one L. L. Ratliff as the person owning the farm. Negotiations were thereupon taken up between them, Ratliff representing himself as owner of the farm, and Newman advising and assisting the respondent Hawk. After some delay the negotiations resulted in two certain written agreements for the exchange of properties, Hawk agreeing to pay a considerable sum in money as the difference between the respective values of the properties agreed to be exchanged. Pending the final closing up of the deal, the respondent became convinced that he had been overreached in the transaction; that he had agreed to pay for the farm a sum greatly in excess of its actual value; and repudiated the agreement. This action was therefore begun to enforce a specific performance. The trial court, after a full trial, refused to enforce the agreements, and this appeal followed.

That the respondent was overreached in the transaction, the evidence abundantly shows. He was induced to agree to pay some thirty-two and one-half dollars per acre for a tract of 420 acres of land which was not worth at that time to exceed twelve dollars per acre. Whether he exercised that due

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diligence to ascertain the conditions which a reasonably prudent person should exercise before entering into a contract of such magnitude, is a more serious question, and one on which the evidence is much less satisfactory. The false representations inducing the purchase related chiefly to the character and value of the land, although it may be worthy of mention that Ratliff, the purported owner, had no interest in the land at all, yet he signed the contract agreeing to convey along with the true owners, and that Newman, who pretended to be the adviser and assistant of the respondent, was actually in the employment of the other side. The land was represented to be first-class farming lands, capable of producing average crops for land of that character under ordinary tillage, and having a given area in cultivation and capable of tillage; whereas the land was not first-class farm land, but was, on the contrary, what is known in that locality as "scab land," having a very light soil, which will produce an average crop only in those seasons when the rains are peculiarly favorable, and that it had a much less area capable of being tilled than was represented. The respondent visited the place but once before making the trade. He arrived there late in the evening of one day and left in the afternoon of the next. According to his own statement he made no close inspection of the property, but simply looked at it generally, such an inspection as could be made by a hurried walk across a field; the time at the farm being taken up principally in a discussion of the terms of the deal. Moreover, the visit was made at the farm's most favorable season, when the verdure was at its best, and before the soil began to show evidences of its incapacity to retain moisture.

The appellants rely upon the rule, often announced by this court, to the effect that one who has means of knowledge before him and refuses or neglects to avail himself of such means of knowledge cannot afterwards be heard to assert that he was defrauded. *Zilke v. Woodley*, 36 Wash. 84, 78 Pac. 299, and the kindred cases to which reference is there made. But

we think this too harsh a rule to be applied to the facts here shown. It cannot be denied that the respondent was grossly defrauded, and that all of the parties to the other side of the contract participated in that fraud. The respondent's conduct was not reckless. To discover the fraud, a careful examination of the land would have had to be made, and probably inquiry among the neighboring land owners, who would at best have been reluctant about informing him of the exact conditions. Under the facts shown, therefore, we think the trial court was justified in affording relief.

"Where it is to the court perfectly plain that one party has overreached the other, and has gained an unjust and undeserved advantage which it would be inequitable and unrighteous to permit him to enforce, we do not believe that a court of equity should hesitate to interfere, even though the victimized parties owe their predicament largely to their own stupidity and carelessness. It is well known that many good people, and people of average or greater intelligence, are sometimes duped and misled by the skill, cleverness, and artifices of those who are adepts in the matter of deceiving their fellow men; and courts should not throw about schemers of this kind a protection that will tend to encourage the practice of their arts. Such people should not find encouragement in the thought that, by keeping their machinations within the letter of the law, they may find sanction for their practices and reap the reward of their craftiness. To the victim it is of little import whether his property is taken from him by a bold and forcible robbery, or by an ingenious and unsuspected deception. The injury to him is the same; and the evil effect of court decisions which permit the wrongdoer to enjoy the fruits of his chicanery is of no small import when viewed from the standpoint of public policy. It is not the function of courts to make contracts for parties, or to relieve them from the effects of bad bargains. But where the simplicity and credulity of people are taken advantage of by the shrewdness, overreaching and misrepresentation of those with whom they are dealing, and they are thereby induced to do unwittingly something the effect of which they do not intend, foresee, or comprehend, and which, if permitted to culminate, would be shocking to equity and good conscience, we think a

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court of equity may with propriety interpose." *Stone v. Moody*, 41 Wash. 680, 84 Pac. 617, 5 L. R. A. (N. S.) 799. See, also, *Wooddy v. Benton Water Co.*, 54 Wash. 124, 102 Pac. 1054, 132 Am. St. 1102; *Bailie v. Parker*, 56 Wash. 353, 105 Pac. 834; *Lindsay v. Davidson*, 57 Wash. 517, 107 Pac. 514; *Best v. Offield*, 59 Wash. 466, 110 Pac. 17, 30 L. R. A. (N. S.) 55.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9443. Department One. July 14, 1911.]

WILLIAM JAMES, *Respondent*, v. BRAINARD-JACKSON &
COMPANY *et al.*, *Appellants*.¹

MORTGAGES—DEFAULT—NONPAYMENT OF INTEREST — OPTION — ASSIGNEE. To entitle the assignee of a mortgage on which an installment of interest is overdue to exercise the option given in the mortgage of declaring the whole sum due, he need only notify the maker that he was the holder and that interest could be paid at a certain place, no formal demand of payment being necessary.

ACTIONS—JOINDER OF CAUSES—SEPARATE LIENS. A mortgage and a mechanics' lien upon the same property held by the same person may be foreclosed in a single action.

MORTGAGES — FORECLOSURE — PARTIES DEFENDANT. The former owner of land is not a necessary or proper party defendant to an action to foreclose a mortgage, although the defendants may have claims against him.

APPEAL — PRESERVATION OF GROUNDS — OBJECTIONS — MECHANICS' LIENS. Defects in a mechanics' lien which are amendable under the statute cannot be first raised in the supreme court.

SUBROGATION — MORTGAGES — FORECLOSURE — PAYMENT OF FIRST MORTGAGE. Upon the foreclosure of two mortgage liens, the second mortgagee is properly subrogated to the rights of the first mortgagee, upon paying into court the amount due on the first mortgage.

MORTGAGES—LIEN FOR TAXES. Upon foreclosure, a mortgagee may recover for taxes paid by him, where the mortgage provided that he might pay the taxes and have a lien on the property therefor.

¹Reported in 116 Pac. 633.

MORTGAGES—MECHANICS' LIENS—FORECLOSURE — ATTORNEY'S FEES.
In an action to foreclose a mortgage and a mechanics' lien, the allowance of \$60 attorney's fees stipulated in the mortgage and \$50 additional for the mechanics' lien is reasonable, and therefore proper, regardless of the apportionment.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered November 21, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage and a mechanics' lien. Affirmed.

W. C. Mitchell, for appellants.

Charles E. Congleton, for respondent.

FULLETON, J.—On June 28, 1907, Willard P. Alward, being then the owner of lot 7, in block 6, of Harrison Heights addition to the city of Seattle, mortgaged the same to one Dorothea Bashaw to secure a loan of \$593 then made to him by the mortgagee. Thereafter, and before the payment of the note or cancellation of the mortgage, Alward sold and conveyed the property to Brainard-Jackson & Company, Incorporated, a corporation. On March 18, 1909, Brainard-Jackson & Company, Incorporated, mortgaged the property to Rasmus Christiansen to secure the payment of a loan of \$1,200 made to it by Christiansen. It thereafter caused a house to be built on the land and incurred an indebtedness thereby of \$405.06 to the Holmes Lumber Company, to secure which the Holmes Lumber Company filed a materialman's lien upon the property. Thereafter Brainard-Jackson & Company, Incorporated, sold the property, conveying the same by quitclaim deed to W. C. Mitchell. Mitchell thereafter purchased the mortgage given by Alward to Bashaw, causing the same to be assigned to his daughter, L. Mitchell. Following this, William James, the respondent in this action, purchased the Christiansen mortgage and the mechanics' lien, taking due and formal assignments of the same. He thereupon tendered to L. Mitchell the principal and interest due

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upon the first mortgage, paid the delinquent and due taxes and assessments levied upon the property by the public authorities, and on default in the payment of the first installment due upon the Christiansen mortgage, brought the present action to foreclose the same, together with the mechanics' lien, setting up also the amount of taxes and assessments he had paid, and prayed that the amount thereof be declared a lien upon the land and that the same be adjudged to him in the decree of foreclosure. The plaintiff made parties defendant to the foreclosure action W. C. Mitchell and his wife, Elvira C. Mitchell, and L. Mitchell. W. C. Mitchell and L. Mitchell answered, putting in issue the material allegations of the complaint and setting out affirmatively the mortgage owned by L. Mitchell, praying that her mortgage be declared a first lien upon the mortgaged property and foreclosure thereof entered, and that the plaintiff take nothing by his action.

On the trial the court held each of the several liens to be valid liens upon the property, that the lien of L. Mitchell was a first and superior to the liens of the plaintiff, and entered a decree foreclosing the several liens and directing a sale of the property; directing further that the lien of L. Mitchell be first paid out of the proceeds of the sale, or in case the plaintiff paid the amount thereof into court, that plaintiff have a lien on the premises to secure the amount thereof and a sale of the property to satisfy the same, together with the several liens held in his own right. From the decree, the several defendants appealed. They gave no supersedeas bond, and subsequent to the appeal, as is shown by a supplemental record, the plaintiff paid into the registry of the court the amount found due on the prior mortgage, and the same was withdrawn by the mortgagee, L. Mitchell. It has been made to appear also that W. C. Mitchell died subsequent to taking the appeal and that his wife, Elvira C. Mitchell, was, by order of this court, substituted as appellant in his stead.

The appellants attack the sufficiency of the complaint. It

is contended, first, that the action, in so far as it related to the mortgage set forth therein, was prematurely brought; second, that two or more causes of action were improperly united; and third, that there is a defect of parties defendant. Neither of these objections is well taken. An installment of interest was overdue on the mortgage, and by the express terms thereof, the holder was, for that reason, empowered to declare the whole sum due and payable. To entitle him to exercise the option it is enough that he give the maker of the notes an opportunity to pay when due. This the holder did by notifying the maker that he was the holder of the note and that the interest could be paid to him at a place stated in the city where the note was payable. He was not obligated to go to the maker and make a formal demand, and such is not the holding in the case of *Bardsley v. Washington Mill Co.*, 54 Wash. 553, 103 Pac. 822, 132 Am. St. 1133. In that case the maker was able and willing to pay the interest, but no opportunity was given him to do so at the place where the note was payable; it having been assigned by the payee and held by a bank in a state other than the one in which the note was payable. It was held that the payor was not obligated to tender payment outside of the place where the note was payable.

In support of the second objection, the appellants contend that the foreclosure of two or more liens cannot be united in one suit, and argue that each separate lien, whether owned by one individual or more than one, must be the subject of a separate action. Doubtless this would be true were the liens upon different parcels of property, but where the several liens are all on the same parcel, they can properly be foreclosed in one suit. Indeed, in most instances this must necessarily be the case; as for example, where there is a dispute as to the priority of the several liens.

The third objection is based on the fact that Willard P. Alward was not made a party defendant to the suit. But Alward was neither a necessary nor proper party. He was in no way obligated to the plaintiff, nor could the plaintiff

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obtain relief against him in any manner, since he had parted with all his interest in the subject-matter of the suit prior to the time of its commencement. The appellants say, however, that they themselves might want some relief against him, since they held his promissory note. If this be true it might warrant the defendants in bringing him in, but it is no cause for holding the complaint insufficient.

Certain objections are made to the lien, and are suggested in this court apparently for the first time. The defects, conceding them material, are all amendable under the statute, and doubtless would have been corrected had they been pointed out to the trial court. Since this was not done we will treat the lien as sufficient.

It is next contended that the court erred in allowing the plaintiff to be subrogated to the rights of the mortgagee on payment into court of the amount due on the first mortgage. But there was no error in this. This mortgage was a lien on the land superior to any of the liens of the plaintiff. It may have been to the advantage of the parties to the suit to have one final decree which would be under the control of a single party. This evidently was the purpose of the order of the court, and the order was well within its equity powers.

It is objected also that the court erred in allowing a recovery for the taxes paid by the plaintiff, but this was permissible under the express terms of his mortgage. That instrument provided that he might pay the taxes on the land as they became due and have a lien on the property for such payment. This was a proper subject of contract between the mortgagor and mortgagee, and any subsequent purchaser or incumbrancer of the property took with notice thereof and subject thereto.

Finally, it is urged that the court erred in allowing two attorney's fees. It appears that the mortgage provided for an attorney's fee of \$60 on foreclosure, and that the court allowed this sum for foreclosing the mortgage and \$50 additional for foreclosing the mechanics' lien. These fees were

reasonable for the services rendered, and this is the final test, regardless of the manner in which the fee is apportioned.

There are other assignments of error but we do not feel that they merit special consideration.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9349. Department One. July 14, 1911.]

CHARLES NELSON, *Appellant*, v. JAMES BRASSINGTON,
Respondent.¹

GOOD WILL—SALE—CONSIDERATION. The sale of a butcher business for the fair market value of the personal property, constitutes a good consideration for the seller's accompanying agreement not to engage in such business in the neighborhood for a specified time.

GOOD WILL—SALE—RESTRAINT OF TRADE—AGREEMENT NOT TO COMPETE—BREACH. The sale of a butcher business, with an agreement by the seller not to engage in such business within twelve blocks of the location for a period of two years, is not void as against public policy; and is breached by the seller's conducting a competing business as "manager" which he advertised as his own, although he worked on a salary without any financial interest in the business.

Appeal from a judgment of the superior court for King county, Carey, J., entered October 26, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, dismissing an action to enjoin a vendor from engaging in a competing business. Reversed.

Higgins, Hall & Halverstadt, for appellant.

Faben & Kelleran, for respondent.

FULLERTON, J.—On and prior to July 27, 1909, the respondent, Brassington, owned and operated a butcher business in one of the outlying districts of the city of Seattle, and on the date named sold the same to the appellant, Nelson,

¹Reported in 116 Pac. 629.

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executing and delivering to him the following bill of sale and contract:

"Know all men by these presents, that James Brassington, of Seattle, the party of the first part, for and in consideration of the sum of seven hundred fifty (\$750) dollars, lawful money of the United States of America, to them in hand paid by Charles Nelson, of same place, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell and convey unto the said party of the second part, his executors, administrators and assigns, the butcher business consisting of all the fixtures, tools, racks, scales, etc., now in use, and being used for the carrying on of said butcher business, said business and said fixtures, tools, racks and scales being located in the store room designated as No. 4865 Rainier Avenue, Seattle, Washington; said business is known as the Rainier Valley Meat Market; the said party of the first part agreeing to not enter into the butcher business within 12 blocks of said building for a period of two (2) years from this date.

"To have and to hold the same to said party of the second part, his executors, administrators and assigns forever. And James Brassington does for his heirs, executors and administrators covenant and agree to and with the said party of the second part, his executors, administrators and assigns, to warrant defend the sale of the said property, goods and chattels hereby made unto the said party of the second part, his executors, administrators and assigns, against all and every person and persons whomsoever lawfully claiming or to claim the same.

"In witness whereof, I have hereunto set my hand and seal the 27th day of July in the year of our Lord one thousand, nine hundred and nine.

"Signed, Sealed and Delivered James Brassington. (Seal)
in the presence of

"Willard Burbank.

"J. A. Kelso."

In March, 1910, before the expiration of two years from the time of the execution of the bill of sale, the respondent, with the cooperation of his brother-in-law, began preparations to open up a butcher shop within twelve blocks of the place of business described in the bill of sale. The brother-

in-law took a lease in his own name of a building near the appellant's market for a term of years and advanced the sum of five hundred dollars to be used in the prosecution of the enterprise. The work of fitting up the market was under the immediate supervision of the respondent. He purchased on his own credit the lumber necessary to fit up the interior of the building and the market fixtures necessary for use in the shop, and seems to have had complete charge of all of the details. He caused a sign to be printed and stretched across the face of the building to the effect that the place would be opened up as a meat market on a certain day under the name of "Yakima Meat Market, James Brassington, Manager." He also requested the editor of the local paper "to give him a boost," and from data furnished by him, the following was produced and published:

"Returns to Columbia.

"James Brassington Will Open Another Meat Market.

"James Brassington, the pioneer butcher of the Rainier Valley, who for many years conducted the Rainier Valley market, opposite the Record office, has returned to Columbia, where he will again go into business.

"Several months ago Mr. Brassington sold his business in Columbia to Charles Nelson and went to North Yakima, where he became associated with the Yakima Meat Company. But the eastern part of the state did not appeal to him like the Rainier Valley and he has returned. He has leased the room formerly occupied by Grayson's hardware store and is having it refitted for a market, which is to be supplied with all the latest and improved sanitary appliances.

"It will be a sanitary market in every sense of the term, Mr. Brassington declares, and will be known as the Yakima Cash Market. Most of the meat will be supplied direct from the abattoirs of the Yakima Meat Company, all being butchered under the closest inspection and sanitary arrangements. Mr. Brassington will also carry fish and game in season, thus affording residents of the Valley a home place to purchase everything in the meat and fish line. He expects to open for business about next Thursday, or Friday."

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On these facts appearing, the appellant conceived that the respondent was undertaking to engage in the butcher business in violation of the agreement contained in the bill of sale, and brought the present action to restrain him from so doing. The appellant, in his complaint, set up the bill of sale and the agreement not to enter into business as therein contained, and alleged a violation thereof on the part of the respondent. The respondent defended on two grounds, first, that the agreement not to enter into business contained in the bill of sale was executed by him without consideration; and second, that the business in which he was about to engage was in fact the business of his brother-in-law, one Holly Cooper, and that his only interest therein was that of manager for a stated salary, he having no interest in the profits thereof. The trial court found with the contention of the respondent and entered a judgment dismissing the appellant's action. This appeal was thereupon taken.

The trial court found that the fair market value of the several articles of personal property sold by the respondent to the appellant approximated the sum paid as the consideration for the sale, and hence concluded that there was no consideration for the remaining part of the agreement not to enter into business within the prohibited territory. But this is not the correct test. Courts, in transactions of this kind, do not inquire into the adequacy of the consideration. This, in the absence of fraud or overreaching, is solely the business of the parties. The court inquires only into the legality of the consideration, not whether the party to be bound made an improvident bargain. Here there was manifestly a legal consideration. By the bill of sale the respondent, for a named sum of money, sold to the appellant his business and agreed not to enter into a like business within a distance of twelve blocks of the place of business sold for a period of two years. The payment by the one party of the sum agreed upon furnished a legal consideration for all of the agreements of the other party—the agreement not to enter into business within

the prescribed territory for the term of years prescribed, as well as the agreement to transfer the shop and fixtures. Indeed, the court could, with the same legal propriety, say that the money paid served as a consideration only for the agreement not to enter into a competing business, as it can say that it served as a consideration alone for the shop and fixtures. The almost universal authority is to this effect. A case in point is *Eisel v. Hayes*, 141 Ind. 41, 40 N. E. 119, in which the court says:

“The contract is as follows:

“ ‘State of Indiana,

“ ‘Jackson County,

“ ‘Agreement between John Eisel and W. H. Hayes, witnesseth:

“ ‘1st. Eisel sells and delivers to Hayes the following personal property, viz: 1 butcher’s cooler, 1 meat rack (with hooks and pins), 2 meat saws, 2 butcher blocks and one counter, for which said Hayes pays cash in hand the sum of forty-five dollars (\$45). And, it is further agreed as a part of this contract, that said Eisel is not to engage in the butcher business in Brownstown, nor nearer thereto than Seymour, Ind., nor sell any meat within that distance, during the time said Hayes carries on the butcher business in Brownstown, Indiana. Said sum of \$45 is now paid by Hayes to Eisel.

“ ‘Witness our hands and seals this 20th day of March, 1893.

“ ‘John Eisel, (Seal.)

“ ‘W. H. Hayes, (Seal.)’

“Appellants contend that the contract does not show any consideration for their promise not to engage in the butcher business at the place and during the time named; that the forty-five dollars was given only for the implements purchased.

“We are of opinion that the whole contract must be taken together, and that the money paid by Hayes was for the transfer of not only the tools sold, but also the good-will promised. The contract is a unit. *Martin v. Murphy*, 129 Ind, 464.

“Besides, ‘the mere purchase of the stock in trade of a party is a sufficient consideration for that party’s agreement

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to abstain from carrying on the particular trade in the place where the purchaser is to engage in it.' *Beard v. Dennis*, Ind. 464.

"In the absence of fraud, the parties are presumed, as in case of any other contract, to have determined the question of consideration for themselves, and the court will not determine its adequacy. *Duffy v. Shockey*, 11 Ind. 70."

So, in 24 Am. & Eng. Ency. Law (2d ed.), p. 852, it is said:

"A contract in restraint of trade is amenable to the general rule that it must be supported by a consideration.

"There has, however, been considerable discussion in the cases upon the question of adequacy of consideration. The earlier cases held that there should be a consideration adequate to the restraint; as Lord Ellenborough said: 'The restraint on one side meant to be enforced should in reason be coextensive only with the benefits meant to be enjoyed on the other.' In a leading case in the Exchequer Chamber, however, the doctrine of the older cases was overruled and the principle established that the court could not inquire into the adequacy of the consideration, provided it was shown to possess some real legal value.

"In numerous cases it has been held that the sale of a business is sufficient consideration for the covenant restraining the vendor from the future exercise of his trade or profession, and that anything more than this is not necessary."

See, also, *Harris v. Theus*, 149 Ala. 133, 43 South. 131, 123 Am. St. 17, 10 L. R. A. (N. S.), 204; *McCurry v. Gibson*, 108 Ala. 451, 18 South. 806, 54 Am. St. 177; *Ryan v. Hamilton*, 205 Ill. 191, 68 N. E. 781; *Up River Ice Co. v. Denler*, 114 Mich. 296, 72 N. W. 157, 68 Am. St. 480; *Kramer v. Old*, 119 N. C. 1, 25 S. E. 813, 56 Am. St. 650, 34 L. R. A. 389.

The trial court erred also we think in its conclusions as to the second question presented. Contracts of this character, when limited as to the time they are to continue, are not inimical to public policy. On the contrary, it is of public interest that every one may freely acquire and sell personal property and property rights. An established business in a

desirable locality has value independent of the actual value of the stock and fixtures that may be on hand. It arises from the fact that the old customers will resort to the old place. This value may be further enhanced by the personnel of the owner or conductor of the business. It is of public interest that the owner and proprietor of such a business should be able to sell it at its full value, and that the purchaser thereof should receive what he desired to buy. Obviously, the only way to obtain the personal element of such a business is to require the vendor to abstain from entering into business in competition with that which he has sold. And while the public interest may be that trade in general shall not be restrained, the law looks with favor upon a contract that enables a vendor to sell his property at its full value, and consequently recognizes and enforces such contracts as he must necessarily make in order to enable him to do so. It therefore looks with favor upon contracts of the nature of the one in suit, and gives it that construction which seems most in consonance with the intent of the parties.

Turning to the agreement, it is at once obvious that it was the purpose of both the vendor and purchaser to transfer to the purchaser, as far as could be done, the personal favor the vendor had with the community in which the market depended upon for patronage. This purpose was accomplished in the only way it could be accomplished; namely, by an agreement on the part of the vendor that he would not enter into a competing business. Now it is likewise obvious that the purchaser will not have the benefit of this part of his bargain if the vendor is permitted to go into a competing business within the prohibited time and prohibited area in any manner by which his personal consideration is thrown in favor of the competing business. The facts in the record show that it is his purpose to do this. The business is advertised as his own. It is to be carried on under a descriptive name, followed by his own name over the title "Manager." No one else publicly appears as having an interest in the business, and naturally

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the public would think that in patronizing the new business they were benefiting the manager personally. In other words, he is now attempting to exert in favor of the new business that public favor with which he is regarded, and which he attempted to, and did as far as lay in his power, sell to the purchaser of the old business. In doing so he violated his contract, and the trial court should have entered a judgment restraining him therefrom.

A parallel case is found in *Jefferson v. Markert*, 112 Ga. 498, 87 S. E. 758, wherein this language was used:

"It is contended, however, by counsel for the plaintiff in error, that the judgment of the court was contrary to evidence, in that the testimony shows the defendant below was not the owner of this building, and had no financial interest in the same; and that, therefore, it did not show upon his part a violation of the contract; that he was merely engaged in the service of his wife, conducting the business as her employee. This gives rise, so far as we have been able to ascertain from investigation, to a new question before this court. After a careful reflection over this question, we are satisfied that the principle laid down in the first headnote is a correct statement of the law bearing on this case; and that a person entering into such a contract, not only stipulating for the sale of his good-will to the vendee, but obligating himself not to engage in a business of selling, handling, or packing meats, in the city of Cordele, during a specified and reasonable time, could not, without violating that contract, carry on in that city, during the period covered by the agreement, a similar business for another, or in another name, of which he was the exclusive manager, and the success of which depended upon his skill, efficiency, influence, and popularity. What is a fair and proper construction of the contract into which he entered? There is no question, under the evidence, that the business in which he engaged was in direct competition with the business bought of him by the plaintiffs. One thing he sold to them was his good-will; an obligation not to engage in a similar business in any of its various forms of selling and packing meats in Cordele. In the light of the testimony, there can be no question that he engaged in such business; and, instead of giving the parties

with whom he contracted the advantages of his good-will, he engaged in a service and occupation which directly had the effect of antagonizing and competing with their occupation, to their injury and damage, by the exercise of his skill and experience in the conduct of a similar business. The contract is not confined to preventing him from entering upon such business in his own name, as owner and proprietor thereof. It can be violated as much by an employee and agent, especially one who has the conduct and control of the business, as it could were he the proprietor of the business in which he engaged."

See, further, *Siegel v. Marcus*, 18 N. D. 214, 119 N. W. 358, 20 L. R. A. (N. S.) 769; *Meyer v. Labau*, 51 La. Ann. 1726, 26 South. 463; *Finger v. Hahn*, 42 N. J. Eq. 606, 8 Atl. 654; *Thompson v. Andrus*, 73 Mich. 551, 41 N. W. 683; *Emery v. Bradley*, 88 Me. 357, 34 Atl. 167; *Wilson v. Delaney*, 137 Iowa 636, 113 N. W. 842; *Geiger v. Cawley*, 146 Mich. 550, 109 N. W. 1064.

The case of *Haley Grocery Co. v. Haley*, 8 Wash. 75, 35 Pac. 595, is not contrary to the position here taken. In that case the agreement between the parties was set forth with particularity, and as we said in *Canady v. Knox*, 48 Wash. 685, 94 Pac. 652, "The only purpose was to prevent him [the party bound] from becoming personally interested in the profits of a rival business, either directly or indirectly." It is not so with the contract in the case at bar. The purpose of this agreement was to prevent the vendor exerting his influence and popularity in favor of a rival business, and this the facts clearly show he is proposing to do.

The judgment is reversed, and the cause remanded with instructions to enter a judgment enjoining the respondent from engaging in any manner in the butcher's business within the area and period of time limited in the contract of sale set out in the complaint.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9611. Department Two. July 14, 1911.]

THE STATE OF WASHINGTON, *on the Relation of the Postal
Telegraph-Cable Company, Plaintiff*, v. THE SUPERIOR
COURT FOR GRANT COUNTY, *R. S. Steiner, Judge,
et al., Respondents.*¹

EMINENT DOMAIN—NECESSITY FOR ROUTE—TELEGRAPH LINE. In condemnation proceedings for a telegraph line, the selection of a general route is conclusive as to the necessity of such route, but the issue is presented whether the particular land sought is a necessary part of the general route adopted.

EMINENT DOMAIN—STATUTES—CONSTRUCTION. Statutes of eminent domain being in derogation of common right, are strictly construed.

EMINENT DOMAIN—NECESSITY—DETERMINATION — JUDICIAL QUESTION. Rem. & Bal. Code, § 925, providing that lands may be condemned if the court shall be satisfied by competent proof that the land sought to be appropriated is necessary for the enterprise, invests the court with power to determine whether the specific land sought is necessary in view of the general location or in the event of bad faith or abuse of power in selection.

EMINENT DOMAIN — NECESSITY — EVIDENCE — BURDEN OF PROOF. While the selection of a route is evidence of the highest character of the necessity therefor, the same is overcome by convincing evidence that the land selected is not reasonably necessary to the general route, and that a slight change of location will equally meet the necessity and do less damage to the owner; and in the absence of any rebutting evidence, the condemnation should be refused.

EMINENT DOMAIN—NECESSITY—EVIDENCE—ADMISSIBILITY. Where a telegraph company was a trespasser in setting up its poles, the cost of their removal cannot be considered upon an issue as to the necessity for condemning an easement for the line.

Crow, J., dissents.

Certiorari to review a judgment of the superior court for Grant county, Steiner, J., entered April 14, 1911, dismissing an action to condemn a right of way for the erection and operation of a telegraph line. Affirmed.

¹Reported in 116 Pac. 855.

Hughes, McMicken, Dovell & Ramsey, for relator, contended, among other things, that unless a corporation acts in bad faith, its discretion in the selection of its route cannot be controlled by the courts. 2 Lewis, Eminent Domain (3d ed.), § 604; 10 Am. & Eng. Ency. Law (2d ed.), pp. 1057, 1058; *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444; *Postal-Telegraph-Cable Co. v. Oregon S. L. R. Co.*, 23 Utah 474, 65 Pac. 735, 90 Am. St. 705; *Union Pac. R. Co. v. Colorado Postal Tel. Cable Co.*, 30 Colo. 133, 69 Pac. 564, 97 Am. St. 106; *Terre Haute & P. R. Co. v. Robbins*, 247 Ill. 376, 93 N. E. 398; *Colorado Southern, N. O. & P. R. Co. v. Boagni*, 118 La. 268, 42 South. 932; *City of Dalles v. Hallock*, 44 Ore. 246, 75 Pac. 204; *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.*, 161 Mo. 288, 61 S. W. 684, 84 Am. St. 717, 51 L. R. A. 936.

Reneau & Clapp and *Aust & Terhune*, for respondents.

ELLIS, J.—The relator instituted proceedings in the superior court of Grant county to condemn an easement to erect, construct, maintain and operate a telegraph line across the south half of the southeast quarter of section twenty-seven, township sixteen, north, of range twenty-five, E., W. M., in Grant county, Washington, now owned by respondents Lelia M. and W. P. Keady. The Milwaukee Land Company was dismissed from the action by stipulation. The amended petition alleges that the petitioner is engaged in the construction, maintenance, and operation of a telegraph line between Seattle and Spokane, and that it is necessary for that purpose to condemn a perpetual easement to erect nineteen telegraph poles, cross-arms, and wires strung thereon across the above described land. The petitioner prays that a jury be empaneled to ascertain the damages. At the hearing by the court on the questions of public use and necessity for the taking, the following facts appeared: The land is high grade agricultural land, valuable for fruit raising, and respondents

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expect to devote it to that use. It is irrigable, and an irrigation ditch has already been constructed thereon. The right of way of the Chicago, Milwaukee & Puget Sound Railway Company crosses the land in a wide curve, running in an easterly and westerly direction through the southern portion thereof at a distance of 220 to 270 feet from the south line of the tract. The right of way is fenced.

Sometime during the summer or fall of 1910 the relator, without any right and without the knowledge or consent of respondents, went upon the land and erected thereon nineteen telegraph poles with cross-arms and wires strung thereon, and a guy wire from one of the poles. The record as to the actual location of the poles is hardly intelligible. It contains no plat showing their location, either with reference to the lines of the land or of the railroad right of way, or with reference to other parts of the relator's telegraph line. The only plat shown is that of the railroad right of way, the pole line not being indicated thereon. Witnesses in testifying with reference to this plat, and counsel in referring thereto, did so by indicating "here" and "there," all of which was doubtless plain enough to the trial court, but is far from lucid on a review of the written evidence. Another map was also used at the trial, but it does not appear in the record. We are able, however, to gather from the oral testimony and the admissions in the briefs and in the argument, that pole No. 1 is located about fifty feet north of the north line of the railroad right of way; that pole No. 4 is located about sixty feet north of that line; that pole No. 11 is about four feet north of that line; that poles Nos. 5 to 11, both inclusive, are in practically a straight line, running from pole No. 4 to pole No. 11; and that poles 11 to 19, both inclusive, are all within about four feet of the north line of the railroad right of way; that there is an angle in the line at pole No. 4 necessitating a guy wire; and that the general direction of the telegraph line follows the right of way of the railroad, but in crossing

respondents' land it departs therefrom for a part of the way a distance of from fifty to sixty feet.

Respondents introduced evidence to show that they, either shortly before or shortly after the beginning of the action, offered relator a right of way free of cost, running along the north side of the railroad right of way and distant therefrom about four feet, if relator would move the poles to that location; that such a line would be a shorter line and more direct for relator and would be of little damage to respondents' land; that the poles set as they now are cause a great damage to the land, cutting it in strips between the irrigation ditch and the railroad right of way, greatly reducing its value for the growing of fruit trees. Relator offered nothing to rebut this evidence, apparently relying on the fact that the poles being placed as they are is conclusive evidence of the necessity of that location, and that evidence of a more direct, equally feasible, less expensive line across respondents' land, less damaging to the land, and equally meeting relator's necessities, was not admissible. The court dismissed the action on the ground that it was not satisfied from the evidence that the land sought to be appropriated is required and necessary for the purpose of the enterprise, but that, on the contrary, the court was satisfied from the evidence that there was no reasonable necessity, and no necessity at all for imposing the damage upon the respondents that would follow the location of the pole line on the specific route indicated in the petition. The record is brought here by certiorari to review this action of the court.

The relator contends that it made a case of necessity by showing that it was a duly organized telegraph company and that it had built its line on the right of way it was seeking to condemn; that mere proof that it had selected such route was sufficient to make a *prima facie* case of necessity in the absence of bad faith.

The adoption of the general route is an inseparable incident of the general enterprise. In the nature of the thing such

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adoption, in connection with and as a part of the enterprise, when made in good faith, must be held conclusive of the necessity of such general route. The issue as to the necessity of any specific land, however, arises in each instance when, in the development of the general enterprise, condemnation of specific land is sought as a part of such general route. The issue is then presented, Is the particular land necessary as a part of the general route so adopted, or may not other land be taken with equal benefit to the enterprise and with less injury to the owner? It is in the determination of this issue that the real question in this case arises; namely, whether the matter of necessity was a legislative question delegated absolutely to the relator, or a judicial question to be determined by the court. Statutes of eminent domain being in derogation of the common right must be strictly construed, both as to the extent of the power and as to the manner of its exercise. *Fork Ridge Baptist Cemetery Assn. v. Redd*, 33 W. Va. 262, 10 S. E. 405; *Seattle v. Fidelity Trust Co.*, 22 Wash. 154, 60 Pac. 133; *Spokane v. Colby*, 16 Wash. 610, 48 Pac. 248; *State ex rel. Attorney General v. Superior Court*, 36 Wash. 381, 78 Pac. 1011.

The statute of this state prescribing procedure for the exercise of this power by private persons and corporations, after stating that the court shall first have satisfactory proof of the things necessary to confer jurisdiction, continues:

"And shall be further satisfied by competent proof that the contemplated use for which the land, real estate, premises or other property sought to be appropriated is really a public use, or is for a private use for a private way of necessity, and that the public interest requires the prosecution of such enterprise, or the private use is for a private way of necessity, and that the land, real estate, premises or other property sought to be appropriated are required and necessary for the purposes of such enterprise, the court or judge thereof may make an order, to be recorded in the minutes of said court, directing the sheriff to summon a jury." Rem. & Bal. Code, § 925.

The judicial determination of the last of the things enumerated is as plainly reposed in the court as is the determination of the other two. We cannot assume that the required proof as to necessity applies only to private ways of necessity. The provision as to such ways was inserted by the amendment of 1897 (Laws 1897, p. 63). The provision requiring the court to be satisfied by competent proof that the land etc., is necessary to the enterprise was a part of this section before it contained any reference to private ways of necessity (Laws 1890, p. 297). The statute, therefore, as applied to the question here involved, provides that, "If the court or judge thereof . . . shall be further satisfied by competent proof . . . that the land, real estate, premises, or other property sought to be appropriated are required and necessary for the purposes of such enterprise," the preliminary order may be made and a jury summoned. Terms more apt for referring this question to the court or judge for determination on evidence can hardly be conceived. It would be an unwarranted refinement to say that this provision applies only to the *amount* of the land to be taken. The statute does not so state, and it is obvious that the taking of specific land sought when other land of the owner would answer as well, and its taking damage him less, may be as oppressive as the taking of more land than is necessary for the enterprise.

We believe that the correct construction of this statute is that those invested with the power of eminent domain have the right in the first instance to select the land which, according to their own views, is most expedient for the enterprise, and that it invests the court with the power to determine whether specific land proposed to be taken is necessary in view of the general location, and to finally determine the question of necessity for the taking of such specific land when there is evidence of bad faith, or oppression, or of an abuse of the power in the selection. Plainly, the selection by the condemnor is evidence of the highest character that the land selected is necessary for the enterprise, and in the absence of

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clear and convincing evidence to the contrary, it conclusively established the necessity. It is sufficient to make a strong *prima facie* case, but when convincing evidence is adduced by the owner that the land sought is not reasonably necessary, and that a slight change of location to other of his land will equally meet the necessity of the taker and be of much less damage to the owner, then it is incumbent upon the taker to rebut such evidence, since the refusal to make such change, if unexplained would amount to oppression and be an abuse of the power. *In re Field*, 61 App. Div. 618, 70 N. Y. Supp. 677.

Our statute is essentially different from any other to which out attention has been called. In nearly every other state the legislature has, either by general statute or by special charters, vested the absolute right to determine the question of necessity in the corporation itself. The nearest approach to this statute is that of California, which provides that, "Before property can be taken it must appear: (1) That the use to which it is to be applied is a use authorized by law; (2) That the taking is necessary to such use; . . ." (Kerr's Cyclopedic Code of Civ. Proc., part 2, § 1241.) The next section provides that "In all cases where land is required for public use the state or its agents in charge of such use may survey and locate the same; but it must be located in the manner which will be most compatible with the greatest public good and the least private injury." *Id.* § 1242. The determination of these questions is not by the California statute referred to the court as they are by that of this state. The supreme court of California has held that, under this statute, the question of necessity is a question of fact to be submitted by the court to the jury, and, in effect, that the language above quoted from § 1242 is but declaratory of the meaning and application of the prior section as to necessity. In *Santa Ana v. Gildmacher*, 133 Cal. 395, 65 Pac. 883, that court says:

"But section 1242, Code Civ. Proc., declares that when land is taken for public use the use 'must be located in the manner

which will be most compatible with the greatest public good and the least private injury.' The question of necessity in a given case involves a consideration of facts which relate to the public, and also to the private citizen whose property may be injured. The greatest good, on the one hand, and the least injury, on the other, are the questions to be determined, and these questions are for the jury, in passing on the question of necessity."

This court in *Samish River Boom Co. v. Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, has defined the word "necessity," as used in our statute, in practically the same way as the California court did in the above cited case. This court there held that in determining the necessity of property sought to be taken, the relative benefit and injury to the respective parties must be considered, using the following language:

"It is true that the petitioner cannot condemn this property in the absence of any necessity therefor. But the word 'necessity,' as used in the statute, 'does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route [here another location], considered in connection with the relative cost to one, and probable injury to the other.' *Mobile & G. R. R. Co. v. Alabama M. R. Co.*, 87 Ala. 508, 6 South. 406."

In *Pasadena v. Stimson*, 91 Cal. 238, 27 Pac. 604, the supreme court of California, says:

"We think the court erred also in excluding the testimony of Gervaise Purcell. It would certainly have tended to prove that the route selected for the proposed sewer was not so good as one that might have been selected, and that it would cause a greater private injury. The offered testimony was to the effect that the witness had surveyed a route 1,432 feet shorter than that proposed, upon a better grade, through lands not thickly settled. We do not say that this testimony would have been conclusive, but it was competent and relevant to a material issue in the case, and should have been admitted, subject to the right of the plaintiff to introduce evidence in rebuttal."

The supreme court of New York, *In re Field, supra*, also held that in determining the question of necessity of a particular route for a road the court should consider the relative damage to the owner and the benefit to the taker. In that case the right of condemnation was refused where the highway as proposed would run through a garden, when the owner offered another equally feasible right of way free. The court found that the wrong to the owner would be out of all proportion to the result to be accomplished. In that case it appeared that, "The statute has imposed upon this court the duty of determining for itself whether the facts justify the sacrifice proposed." A statute of Wisconsin gave to any railroad the right, "to lay out its road not exceeding 100 feet in width, and to construct the same; and for the purpose of cuttings and embankments and of obtaining gravel or other material to take as much land as may be necessary for the proper construction, operation, and security of the road, . . . " (Rev. St. Wis., § 1828, subd. 4.) In *Wisconsin Cent. R. Co. v. Kneale*, 79 Wis. 89, 48 N. W. 248, the railroad company sought to condemn land for gravel. The court held that as to the right of way not exceeding 100 feet wide, the statute made the selection by the company final, but that as to any other land sought to be taken the question of necessity is a judicial question to be determined by the court. The opinion quotes the statute of procedure in such cases (§§ 1846, 1847), using the following language:

"The section then provides for giving parties interested notice of a hearing upon such petition, and authorizes any party interested in the lands to be taken to show cause against granting the prayer of the petition, and then provides '*that the court or judge shall hear the parties interested, and may adjourn from time to time, as shall be convenient; and shall determine whether the railroad corporation is entitled to take the whole or any part of the lands sought to be acquired, and, if no sufficient cause is shown against granting the prayer of the petition, shall make an order.*' etc. The part of the statute above italicized clearly confers upon the judge or

court judicial power to determine the right of the corporation to take the lands asked for, as well as the necessity for taking the same when asked to be taken for any other purpose than for its right of way,—not exceeding 100 feet in width. If, as the contention is on the part of the appellant company, the right to take the real estate desired and the necessity for taking it is to be determined by the company itself, it seems to us the legislature would have used different language from that found in the statute.”

It will be noted that the Wisconsin statute, § 1828, grants to the railroad the absolute right to select a right of way not exceeding 100 feet and construct its road thereon. The word “necessary” is only applied to other lands sought. It will also be noted that the language quoted by the court from the statute of procedure is no more positive in making the question of necessity as to such other lands a judicial question than that of this state is as to any lands sought for any purpose.

This court has already determined, by practical application of our statute (Rem. & Bal. Code, § 925), that it makes the question of necessity of the particular land sought a judicial question. Rem. & Bal. Code, § 8736 (1 H. C. § 1571), giving to one railroad company the right to cross the tracks of another says:

“And if the two corporations cannot agree upon the amount of compensation to be made therefor, or the points and manners of such crossings and connections, the same shall be ascertained and determined in the manner provided by law for the taking of lands and other property which shall be necessary for the construction of its road.”

This section thus plainly refers the court for its power to determine the necessity as between the two roads to Rem. & Bal. Code, § 925 (1 H. C. § 651).

In *Seattle & M. R. Co. v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217, the contention was made by the junior road, as by relator here, that in the absence of bad

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faith in its selection, the court had no right to inquire into the necessity or place of crossing, but this court said:

"Now it is a provision of Code Proc., § 651, that if at the time and place appointed for the hearing of the petition the court or judge shall be satisfied by *competent proof* 'that the land, real estate, premises or other property so sought to be appropriated are required and necessary for the purposes of such enterprise,' he shall make an order for a jury. The mere statement of the petitioner is not, under this law, to be taken as final, but the court must be *satisfied* by 'competent proof,' and upon that and that alone he is authorized to act further. Nothing is said about cases where there may be a failure of such proof, but the plain implication follows that if the proof is not made the proceeding must fail. And this proof must satisfy the court that the condemnation as proposed is 'required and necessary,' a mere showing of convenience or lessening of expense not being sufficient."

There is nothing in Rem. & Bal. Code, § 925 limiting its operation to cases where the railroad seeks to take the land of another railroad. It is a general law relating to procedure in all cases of condemnation, while Rem. & Bal. Code, § 8736 is special in its nature, relating to the right of railroads to cross each other, and refers to the general law for procedure. While in such cases the selection by the junior company cannot, in the nature of the case, be accorded as strong probative force in determining the necessity as where land not claimed by the owner for public use is sought, the difference is not fundamental but is only a difference in degree. In the opinion last cited, on page 169, this court also points out the difference between the statute of Illinois and that of this state. In reference to a citation of *Lake Shore & M. S. R. Co. v. Chicago & W. I. R. Co.*, 97 Ill. 506, the court said: "Moreover, the eminent domain act there under discussion did not contain any provision requiring the court to be satisfied of the necessity of the proposed taking."

The relator cites *State ex rel. Clark v. Superior Court*, 62 Wash. 612, 114 Pac. 444, recently decided by the court, as determining that, under Rem. & Bal. Code, § 925, the ob-

jection that the particular land selected by the condemning company is not reasonably necessary is never available to the owner. But in that case the company made a *prima facie* case of necessity by proving a survey and location of its proposed road, and no proof was offered in defense to show that the land so selected was not reasonably necessary, or that the taking would be oppressive, or that a slight change of route would equally meet the necessity and be less damaging to the owner. There is nothing to show that the proposed taking would be oppressive. The decision really rests upon the *prima facie* proof made by the selection. Under the evidence in that case the decision could not have been other than it was. While the language of the court is broader than was necessary to a decision, it must be construed in its application to the facts there presented. The peculiar wording of the statute was not mentioned in the briefs, which probably accounts for the unnecessary breadth of statement. The general rule there quoted from 2 Lewis on Eminent Domain (3d ed.), § 604, saves the very exception to the rule made by our statute. The quotation is as follows:

"It may be objected that there is no necessity of condemning the particular property, because some other location might be made or other property obtained by agreement. But this objection is unavailing. *Except as specially restricted by the legislature*, those invested with the power of eminent domain for a public purpose, can make their own location according to their own views of what is best or expedient, and this discretion cannot be controlled by the courts."

The words which we have italicized show that the eminent author based the rule announced upon statutes containing no such restriction as found in Rem. & Bal. Code, § 925, and an examination of the cases cited by him will so show. In the California case cited in support of the text, *Rialto Irr. Dist. v. Brandon*, 103 Cal. 384, 37 Pac. 484, the selection by the district was shown, and no opposing evidence was apparently offered. The statute of that state, which as we have seen is

somewhat similar to that of this state, is not referred to in the opinion.

Our construction of this statute gives no reasonable ground for the fear expressed further on in Lewis on Eminent Domain, § 604, that, "The result would be that the plaintiff could not condemn any land, for every other land owner would likewise have the same right to object to his land being condemned." The condemnor does not have to show an absolute necessity, but only a reasonable necessity. As we have said, the *prima facie* case made by evidence of the selection can only be overcome by clear and convincing proof that the taking of the specific land sought would be so unnecessary and unreasonable as to be oppressive and an abuse of the power. There is certainly no more reason to fear that the courts will lose sight of the necessities of any meritorious enterprises than that the condemning company if unrestrained might lose sight of the rights of the owner. It will hardly do to assume that the courts will abuse their powers and that condemnors will not. At any rate, the legislature has, in plain terms, vested the final determination in the court upon competent proof, and we have no power to hold otherwise.

Counsel for relator cite many cases from other states which seem to support their contention; but an examination convinces us that they all arose under statutes so different from that of this state as to render them inapposite. Relator complains that there is no evidence as to the cost of the removal of these poles. We think such evidence would be immaterial. The relator was admittedly a trespasser, and while it lost no right by reason of its trespass, neither did it gain any. The only consideration we can give to the trespass is to accord to it the same force as a formal selection of that route across respondents' land. The cost of removal of the poles has no bearing upon the question of original necessity for that particular route. It may be conceded that there is no evidence of bad faith in the original location on the part of the relator. There was, however, evidence that its selection was so un-

necessarily injurious to respondents as to amount to an abuse of the power.

In view of the evidence, we cannot say that the trial court exceeded the power vested in it by the statute. Judgment affirmed.

DUNBAR, C, J., PARKER, and CHADWICK, JJ., concur.

CROW, J. (dissenting)—A reasonable necessity for the land sought to be condemned for a conceded public use, has in my opinion been shown. I therefore dissent.

[No. 9498. Department Two. July 15, 1911.]

C. SCHULENBARGER, *Appellant*, v. A. H. JOHNSTONE *et al.*,
Respondents.¹

EASEMENTS—CREATION—WAYS OF NECESSITY. An easement cannot be claimed as a private way of necessity over the lands of another unless there be a dominant and servient estate.

EASEMENTS — CREATION — PRESCRIPTION — PRIVATE WAYS. To acquire an easement for a private way by prescription, the travel must be over a uniform route, continuous, and adverse to the owner of the land, at a time when he could object; use of uninclosed lands, which were later fenced, leaving gates or bars as a neighborly accommodation, is not sufficient, showing merely a permissive use.

Appeal from a judgment of the superior court for Stevens county, Kellogg, J., entered May 27, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action for an injunction. Affirmed.

Jesseph & Grinstead, for appellant, contended, among other things, that an easement for a private way of necessity may be acquired by adverse possession or prescription. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; *Van de Vanter v. Flaherty*, 37 Wash. 218, 79 Pac. 794; *Northern Counties Inv.*

¹Reported in 116 Pac. 843.

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Trust v. Enyard, 24 Wash. 366, 64 Pac. 516; *Seattle v. Smithers*, 37 Wash. 119, 79 Pac. 615. The use was not permissive; where continued for the prescriptive period, it is presumed to be adverse unless it is explained to be otherwise. 22 Am. & Eng. Ency. Law (2d ed.), pp. 1199, 1202; *Lechman v. Mills*, 46 Wash. 624, 91 Pac. 11, 13 L. R. A. (N. S.) 990. See, also, as to the doctrine of permissive use, *Bennett v. Biddle*, 140 Pa. 396, 21 Atl. 363; *Stewart v. White*, 128 Ala. 202, 30 South. 526; *French Piano & Organ Co. v. Forbes*, 129 Ala. 471, 29 South. 683, 87 Am. St. 71; *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876, 22 Am. St. 568.

Howard W. Stull and *H. Wade Bailey*, for respondents.

CHADWICK, J.—Appellant brought this action seeking to restrain respondents from interfering with his use of a roadway now, and for some time past, used by appellant and his grantors. The roadway to which appellant asserts the right of user runs from his land across the lands of respondents through bars and gates, and connects with the public road on the south line of respondents' lands. Although settled upon about the year 1885, respondents' lands were not fenced until nine or ten years thereafter. The first settlers upon the lands now owned by the appellant traveled at will in going to or coming from the main road, and over, as the testimony shows, three or four different routes, depending upon the condition of the roads and the objective point. After the land was fenced, appellant and his grantors had gone through the fences, bars, or gates, as they have been from time to time maintained. There is evidence tending to show, also, that, although a way of no greater width than a wagon track has ever been used over the land, this has been shifted in very recent times to meet the convenience of the parties, and in one instance, at least, after express permission so to do obtained by appellant from respondents. There are no findings of fact brought to this court, but the position as-

sumed by appellant is made plain by reference to his complaint. He alleges:

"That the lands of the said plaintiff now are and for more than ten years last past have been land locked, and that there is no means of ingress or egress to and from said premises except by a roadway running diagonally across the easterly portion of the southeast quarter of the northwest quarter of said section, township and range, which said land is now owned and occupied by the said defendants, and that said roadway has been used, openly, notoriously, continuously and adversely by the owners and the occupants of the land now owned by the plaintiff for a period of more than ten years prior to the date hereof, and the right to use said roadway over and across said land so owned by the said defendants has never been denied, but the same has been used to the knowledge of all persons, including the said defendants who owned or occupied the lands of the defendants for more than ten years, and has for more than said period of time been well defined, open and apparent to all persons and the owners and occupants of the land now owned by the plaintiff have worked said roadway, kept the same in repair and for such purpose have expended large sums of money, all with the knowledge and consent of the said defendants and the owners and occupants of said premises now owned by them, and that said roadway for more than said period of ten years so used, as aforesaid, was and now is of the width of thirty feet.

"That said defendants for some time last past and within the last year have obstructed said roadway by building fences into and upon the same, by erecting posts and placing wagons and farm machinery therein, and by stretching and maintaining ropes and other obstructions in, across and upon the same to such an extent as to prevent entirely the use of said roadway by the said plaintiff, and the said defendants are threatening to and will wholly and completely block, obstruct and fence up said roadway and deprive the said plaintiff of any and all means of ingress and egress to and from his said lands to the irreparable injury of the said plaintiff, unless enjoined by this court from so doing."

The lower court found that appellant had not sustained the

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burden of his complaint, and entered a decree denying him all relief.

Appellant brings the case here, asserting that he is entitled to have his right of easement established by a decree of the court, upon two theories: (1) that the alleged roadway is a private road of necessity; and (2) that time has brought confirmation of his right under the doctrine of prescription. The first ground may be dismissed summarily. Whatever the necessities of the parties may be, a private way of necessity, as that term was defined at common law, does not apply to a way over the land of another, unless there be a dominant and servient estate. There can be no private way of necessity over the lands of a stranger. The right to use the way as a private way of necessity finds its support in the doctrine of estoppel, and is usually, if not universally, applied where a grantor, immediate or common, has sold land which would, unless connected in some way with the established highways of the country, be useless to the grantee. Hence, an intention to grant an easement is implied. The common law definition of the term has been adopted as the law in this state. This point is so well and thoroughly covered in *Healy Lumber Co. v. Morris*, 33 Wash. 490, 74 Pac. 681, 99 Am. St. 964, 63 L. R. A. 820, that we shall not pursue it further. See, also, *Malsch v. Waggoner*, 62 Wash. 470, 114 Pac. 446.

Whether the facts of the case bring it within the cases holding that an easement for a private way may be acquired by prescription, is the only question for us to decide. That an easement may be so acquired has been held by this court. *Wasmund v. Harm*, 36 Wash. 170, 78 Pac. 777; *Van De Vanter v. Flaherty*, 37 Wash. 218, 79 Pac. 794. In the *Harm* case the court said that, in order to gain a prescriptive right of way across the land of another by user, those asserting the right must show travel over a uniform route; and that the use must have been continuous, uninterrupted, and adverse to the owner of the land over which the way is claimed,

and with the knowledge of the owner, and during a time when he was able in law to assert and enforce his rights. Bearing in mind this test, we are convinced, by a careful reading of the evidence, that the trial judge was correct in his ruling. We find nothing to sustain the contention of the appellant that the use of the way was hostile or adverse, in the sense that it was used in defiance of the respondents' title. Neither is it made to appear that the way was ever so fixed or defined as to raise a presumption of grant against the owners of the land. Nor has it ever been maintained by the appellant as anything other than a way of convenience.

We understand the rule to be that a hostile or adverse intent must mark the inception of the use upon which title is made to depend, or, if the original use be permissive, a changed intent on the part of the user, or the mere lapse of time, although the term of the original permission is agreed upon, will not initiate or ripen a title. Such is the logic of the case of *Scheller v. Pierce County*, 55 Wash. 298, 104 Pac. 277. In that case there was a grant for a fixed period of time, and although the right of the grantor had not been reasserted, but a time equal to the period of limitations had run after its expiration, during all of which time the public had used the way, it was held that the use was still permissive, the court adopting the text of Jones on Easements, §§ 282, 284, as an accurate statement of the law, and quoting from *Pitzman v. Boyce*, 111 Mo. 387, 19 S. W. 1104, 33 Am. St. 536, as follows:

“If permissive in its inception, then such permissive character being stamped on the use at the outset, will continue of the same nature, and no adverse user can arise until a distinct and positive assertion of a right hostile to the owner, and brought home to him, can transform a subordinate and friendly holding into one of an opposite nature, and exclusive and independent in its character.”

It can hardly be contended that it was ever the intent of the law to hold that a private easement could be created over

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the lands of another at a time when they were open and uninclosed. It has never been so held, although the right be asserted by the public, unless under some controlling circumstances such as the expenditure of public moneys under the supervision of the road overseer, or some element of acquiescence on the part of the owner as instanced in the case of *State v. Horlacher*, 16 Wash. 325, 47 Pac. 748. It was held in *Watson v. County Com'rs*, 38 Wash. 662, 80 Pac. 201, where the court said:

“While we do not now hold that a right of way by prescription cannot be acquired over wild, unoccupied prairie lands, we do hold that, in order to give a prescriptive right, the use must at least be such as to convey to the absent owner reasonable notice that a claim is made in hostility to his title. It seems to us that any other rule amounts to a practical confiscation of private property for public purposes.”

It will be admitted that the rule must of necessity be more liberal in favor of the public than in favor of an individual. And granting that a prescriptive right would not begin to run prior to the time that the land was fenced, we find nothing in the circumstances that the owner left gates and bars to indicate a surrender or acquiescence on the part of the landowner. On the contrary, it evidences a different intention. *Scheller v. Pierce County, supra*.

“If there are any acts which indicate the intention of the owner of the soil to preserve the control to himself, like the erection of a fence and gate, it cannot be said that the intention is established, and the road does not become a highway, however long it may have been used, even beyond the period of twenty years. Such permissive use, in the absence of any intention to dedicate, is but a mere license, which may be revoked at the pleasure of the owner.” Monographic note (*Whitesides v. Green*, 13 Utah 341, 44 Pac. 1032), 57 Am. St. 758.

In the case at bar, we see no more than the usual accommodation between neighbors that marked the settlement of the public domain. Until roads are lawfully established, as

said by one of the witnesses, "they [meaning the public] must go somewhere," and by common consent the pioneer settling in front of another has usually been willing that his neighbor should continue his way over the land occupied by him. To charge the owner with acquiescence, or to credit the user with an adverse intent, would put a penalty upon generosity, and consequently, as is said in the *Scheller* case, *supra*, destroy all neighborhood accommodation;

"For if it were once understood that a man, by allowing his neighbor to pass through his farm without objection over the pass-way which he used himself, would thereby, after the lapse of twenty or thirty years, confer a right on him to require the pass-way to be kept open for his benefit and enjoyment, a prohibition against all such travel would immediately ensue." Jones, Easements, § 282.

Finding no error in the record, the judgment is affirmed.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9525. Department One. July 15, 1911.]

EFFIE M. SPOAR *et al.*, *Appellants*, v. SPOKANE TURN-VEREIN, *Respondent*.¹

APPEAL—RECORD—STATEMENT OF FACTS—AFFIDAVITS. The vacation of a default judgment, heard upon affidavits, cannot be reviewed unless the affidavits are brought up on appeal by a statement of facts or bill of exceptions, where they are not attached to the motion and part of the record.

JUDGMENT—DEFAULT—VACATION. It is discretionary to open a default judgment against a corporation, where the papers were served upon an officer who was unfamiliar with legal proceedings and mislaid and lost the papers until after entry of the judgment, and the motion was made with diligence.

NEGLIGENCE—DANGEROUS PREMISES—PLEADING—ANSWER. In an action for injuries sustained by a fall upon a stairway landing, an answer alleging contributory negligence states a defense.

¹Reported in 116 Pac. 627.

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Opinion Per Gose, J.

LANDLORD AND TENANT—CONDITION OF PREMISES—INJURIES TO THIRD PERSON—LIABILITY. The owner of leased premises is not liable to one visiting an exhibition therein, for injuries caused by snow and ice on an outside stairway landing, where the tenant giving the exhibition was in exclusive possession and control of the premises, including the stairway, and when leased the premises were in safe condition and free from snow and ice.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered October 4, 1910, upon overruling demurrers to affirmative defenses, dismissing an action for personal injuries sustained by falling upon a stairway, after a hearing before the court. Affirmed.

John Salisbury, for appellants.

Merritt, Oswald & Merritt, for respondent.

Gose, J.—This is an action to recover damages for injuries sustained by the plaintiff Effie M. Spoar, on January 13, 1910, from falling upon the steps of an outside stairway leading to a hall in a building owned by the defendant. The complaint alleges, that the building was temporarily occupied by the Spokane Poultry Association under a license from the defendant for the purpose of exhibiting poultry, and that the defendant retained full control of the premises; that the plaintiff visited the poultry show, and while attempting to leave the building by the stairway, slipped upon the ice which the defendant had negligently permitted to accumulate, and sustained serious injuries. The complaint and summons were served upon the defendant upon April 15, 1910, by delivery to defendant's acting president. An order of default was entered on May 9, and a default judgment was entered against the defendant on May 24, for \$15,150 and costs, the amount prayed for in the complaint. On June 8 the defendant filed a motion to vacate the order of default and the judgment. On June 18 a general demurrer was interposed to the motion. On July 13 an order was entered overruling the demurrer and vacating both the order of default and the

default judgment, and giving the defendant one week in which to plead to the complaint.

The answer joined issue upon the charge of negligence, and pleaded two affirmative defenses. In the first affirmative defense it is alleged, in substance, that the defendant leased all of the building to the poultry association for the period of one week beginning January 10, 1910, except certain rooms in the basement occupied by its janitor; that by the terms of the lease it was agreed that the association was to have, and it did have during such time, the exclusive use and possession of the entire building, including the stairways and approaches leading thereto, except as heretofore noted; that the upper portion of the building consists of a hall, the entrance to which is by an outside stairway; that the basement is not entered by such stairway; and that at the time it made the lease, the premises, including the stairway, were, and continued to be, in a safe condition, free from snow and ice. It is further alleged that everything pertaining to the use and occupancy of the premises during the leasehold term was to be furnished by the association, except the necessary lights. In the second affirmative defense, it is alleged that, if the plaintiff was injured, the injury was caused by her own negligence. The plaintiff demurred to each of the affirmative defenses, on the ground that neither thereof states facts sufficient to constitute a defense. An order was thereafter entered overruling each of the demurrers, and counsel for the plaintiff announcing that he refused to plead further and that he would stand upon his demurrers, a judgment of dismissal was entered. The plaintiff has appealed from the order overruling his demurrer to the motion to vacate the order of default and the default judgment, from the order vacating the same, and from the judgment of dismissal.

The motion to vacate the order of default and the judgment recites that it is based upon the "record, files, and pleadings . . . and upon the affidavits hereto annexed, and the affidavits hereafter to be secured and filed with the clerk" of

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the court. There is but one affidavit attached to the motion. The order overruling the demurrer and vacating the order and judgment of default recites that the court has "read the affidavits in support of and against the motion." There is no statement of facts before us. The affidavits must be brought here by a bill of exceptions or statement of facts, or the evidence cannot be reviewed. *Hotel Co. v. Merchants' Ice etc. Co.*, 41 Wash. 620, 84 Pac. 402; *Tatum v. Boyd*, 11 Wash. 712, 39 Pac. 639; *Sellers v. Pacific Wrecking etc. Co.*, 34 Wash. 111, 74 Pac. 1056. It is patent, from the recital in the order, that the respondent presented to the court more than one affidavit, and that the court reached its conclusion from reading all the affidavits offered by the parties. As was said in the *Sellers* case, every intendment is in favor of the regularity of the record in a court of general jurisdiction. In *Morgan v. Bankers Trust Co.*, 63 Wash. 476, 115 Pac. 1047, we said, in considering an appeal from an order denying a motion for a new trial:

"We are led to conclude that, in the absence of the evidence upon which the verdict and judgment were rendered, the presumptions in support of the judgment overcome the presumption of prejudice arising from erroneous instructions in this case, assuming, for argument's sake only, that the instructions complained of do not correctly state the law."

In *State v. Vance*, 29 Wash. 435, 70 Pac. 34, cited by the appellants, there was a single affidavit attached to and made a part of the motion for a continuance, and it was definitely referred to in the order overruling the motion. It was, therefore, held that the affidavit became a part of the record without being certified in a bill of exceptions or statement of facts. The rule there announced applies to the affidavit referred to in the motion in the case at bar, but has no application to the other affidavits. The motion was informal, and was based upon facts stated in the accompanying affidavit and to be stated in the other affidavits to be filed in the case.

Moreover, the facts stated in the affidavit accompanying

the motion warranted the court, in the exercise of a sound judicial discretion, in vacating the order of default and the judgment. A reference to the dates will disclose that the respondent moved promptly against the default and default judgment. The substance of the affidavit is, that the affiant, the officer of the respondent on whom the complaint and summons were served, is a native of Germany, unfamiliar with legal proceedings in this country; that he has never attended our courts except as a witness; that he believed, until after the entry of the default judgment, that no further action would be taken until he had been served with a notice or process stating the exact date on which the trial of the action would occur; that he was very busy when the papers were served upon him; that he laid them aside at that time without reading them; that thereafter and before the entry of the order of default, he made diligent search for the complaint and summons, but was unable to find them until after the order of default and the default judgment had been entered, and that he did not know their contents. See, *Bozzio v. Vaglio*, 10 Wash. 270, 38 Pac. 1042; *Kuhn v. Mason*, 24 Wash. 94, 64 Pac. 182; *Wilson v. Seattle Dry Dock & Ship Bldg. Co.*, 26 Wash. 297, 66 Pac. 384.

The correct rule is aptly stated by Judge Hadley, in *Moody v. Reichow*, 38 Wash. 303, 80 Pac. 461, as follows:

“Discretion must, however, be exercised for reasonable cause, and upon such grounds as may reasonably happen to a person in the exercise of ordinary diligence in the protection of his rights.”

It is next insisted that the court erred in overruling the demurrers to the affirmative defenses. It is too patent to require discussion that the second affirmative defense, alleging that the injury, if any was caused by the appellant's own negligence, states a defense.

The first affirmative defense, as we have seen, in substance, is that, when the injury occurred, the poultry association was in the exclusive possession and control of the premises, in-

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cluding the stairway leading to the hall, under a lease for one week; that it was to furnish everything pertaining to the use and occupancy of the hall during the term, except lights; that the hall and stairway when leased were, and continued to be, in safe condition and free from snow and ice. These facts would, if proven, exonerate the respondent from liability. *Ward v. Hinkleman*, 37 Wash. 375, 79 Pac. 956; *Baker v. Moeller*, 52 Wash. 605, 101 Pac. 231.

The appellants have cited *Coupe v. Platt*, 172 Mass. 458, 52 N. E. 526, 70 Am. St. 293; *Trustees of Canandaigua v. Foster*, 156 N. Y. 354, 50 N. E. 971, 66 Am. St. 575, 41 L. R. A. 554, and *Mitchell v. Brady*, 124 Ky. 411, 99 S. W. 266, 124 Am. St. 408, 13 L. R. A. (N. S.) 751. In the *Coupe* case the defendant, a landlord, maintained outside steps and a platform for the use in common of tenants of different parts of the building. The plaintiff was injured by a defect in the platform while passing over it on a visit to one of the tenants, made on his invitation to come on a particular day for a particular purpose. The court said that the duty of the defendant to keep the platform safe for the tenant, and for those claiming under him, grew out of the contract of hiring, and that it was a part of the contract that the landlord should keep the platform reasonably safe for the tenant for use in connection with the tenement. It was held that the landlord owed the same duty to an invited guest that she owed to the tenant personally, to keep the platform reasonably safe. The *Foster* case was a suit by trustees of the village as representatives of the general public, to recover damages which they had been compelled to pay on account of personal injuries sustained by a pedestrian through an accident caused by a defective grate in the sidewalk in front of defendant's premises. The court emphasized the fact that the question was not one between the owner and his tenant or patrons of the tenant, but between the owner and the representatives of the general public, entitled to a safe passage over the sidewalk as a part of the highway. The court said that the lease of

the entire premises, and possession thereof by the tenant, would throw the burden of maintaining the grate in a safe condition upon the latter. In the *Mitchell* case it was held that the owner of a building with projections over the sidewalk is not absolved from liability to a person injured by the falling of the projections on the sidewalk by reason of the fact that he has leased the property to another and the tenant has obligated himself to keep the property in repair. These cases are distinguishable upon the facts.

The judgment is affirmed.

DUNBAR, C. J., PARKER, MOUNT, and FULLERTON, JJ.,
concur.

[No. 9282. Department One. July 17, 1911.]

CHARLES L. WINGARD, *Appellant*, v. GRANT COPELAND *et al.*,
Respondents.¹

VENDOR AND PURCHASER — CONTRACTS — TITLE OF VENDOR — FEE SIMPLE—OUTSTANDING EASEMENTS. A vendor cannot convey a "full fee simple title" where the land is subject to an easement for a water ditch.

SAME. In an agreement to convey a full fee simple title free and clear from taxes, mortgages and other liens, the enumeration of taxes, mortgages, etc., does not lessen the force of the stipulation for a fee simple title, and the agreement is not satisfied by a title subject to an easement.

SAME. An agreement to furnish a full fee simple title is not satisfied by a marketable title subject to an easement.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered August 11, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

Herbert C. Bryson and John H. Woodward, for appellant.
Sharpstein & Sharpstein, for respondents.

¹Reported in 116 Pac. 670.

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Opinion Per PARKER, J.

PARKER, J.—This action was commenced by the plaintiff in the superior court under Rem. & Bal. Code, § 195, to recover from the defendants the purchase price of land in Walla Walla county under a contract for the sale thereof to the defendants. The defendants resisted the plaintiff's claim upon the ground that his title to the land is imperfect and not such as he agreed to convey, and they asked for affirmative judgment against him in the sum of \$100, being the amount paid by them as earnest money upon the contract price. A trial before the court resulted in a judgment in the defendants' favor, annulling the contract and awarding them judgment against the plaintiff for the amount of earnest money paid upon the contract. From this disposition of the case, the plaintiff has appealed.

The following facts are clearly established by the record, and we think are all that need be noticed in determining the rights of the parties. A written contract for the sale of land from appellant to respondents was entered into by the parties in March, 1909. The contract was in the form of a written offer made by appellant and accepted by respondents. The agreement as to the title to be conveyed was contained in the written offer of appellant as follows:

"I hereby submit to you proposition of sale of my ten-acre tract southeast of Walla Walla about which we have been dealing. My price is \$8,750 net cash, free and clear of any commissions, this price to include all crops now seeded or to be seeded on said lands and a full fee simple title free and clear from any taxes, mortgages or other liens of any character."

Upon accepting the offer respondents paid to appellant \$100 as earnest money upon the purchase price. The contract contemplated the furnishing of an abstract of title and the completion of the sale thereafter. The following, among other things, appear from the abstract, touching the condition of appellant's title. The land here involved lies in the east $\frac{1}{2}$ of the southeast $\frac{1}{4}$ of sec. 28, tp. 7 N., R. 36 E. An owner of land in the west $\frac{1}{2}$ of this quarter section has an

easement right in connection therewith under a deed thereto from a prior owner of the quarter section, in which deed such easement rights are described as follows:

"Also, the right to enter upon the east half of said southeast quarter of said section twenty-eight in said township and range and at any point by ditch, flume or other waterway conduct any or all the water from that certain creek called Yellow Hawk flowing through the same down, through and over said premises into and upon the hereinbefore granted land, and other neighboring and adjoining land, for milling, manufacturing or any other kind of industrial purpose, and also, for irrigation, and to that end to dig, construct, establish and maintain (but on condition that the same be kept in good order and repair) any suitable and convenient ditch, flume or waterway not exceeding ten (10) feet in width, and also, at any point in said Yellow Hawk creek on said premises to build and maintain any good and sufficient dam, although the same should cause water to back up in said stream on other lands of the party of the first part; and also, the further right to enter upon any of the lands of said party of the first in said section twenty-eight and also in section twenty-seven, in said township and range and by suitable pipes placed in the ground to take and conduct water from any stream and springs thereon, subject to prior like rights heretofore granted to John B. Allen, his heirs and assigns to the hereby granted land for domestic and irrigating purposes thereon."

Under this grant there is maintained a water pipe line across the land here involved, and it is clear that appellant's title is subject to this easement.

Let us now inquire as to the effect of this easement right upon appellant's title, and as to what extent it impairs his ability to convey to respondents "a full fee simple title" as provided by the terms of the contract of sale. The contention of counsel for appellant seems to be that, since his title is subject only to this easement, it is none the less a fee simple title, and his ownership and dominion over the land is nevertheless all that the words "fee simple title" implies.

The supreme court of Indiana, in the case of *Indiana etc. R. Co. v. Allen*, 113 Ind. 581, 15 N. E. 446, discussing the nature

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of a fee simple title where it was claimed that such a title did not exclude an easement, said:

“The case before us is quite as strong as one could well be, for here the complaint averred that the appellee was the owner in fee simple and that the claim of the appellant was unjust and unfounded, and so the court expressly finds and decrees. This decree, therefore, adjudges that the whole interest is absolutely in the appellee, and that the claim of the appellant is utterly groundless. A decree adjudging the whole title to be in the plaintiff, and that the defendant’s claim is unjust and unfounded, necessarily settles the whole controversy and covers the title and its incidents. This would, indeed, be the effect of the decree if it did no more than adjudge the fee to be in the plaintiff, for he who owns the absolute fee has an unclouded and unburdened estate. As said in *Dumont v. Dufore*, 27 Ind. 263, ‘A title in fee simple means a title to the whole of the thing absolutely.’ This statement of the law has been quoted with approval. *Stockton v. Lockwood*, 82 Ind. 158; *Arnold v. Smith*, 80 Ind. 417.

“It is no doubt true that a defendant may have his interest, whatever it may be, protected in a decree; but if the decree contains no limiting clause, and adjudges his claim to be unjust and unfounded, and that of the plaintiff to be in fee simple, it conclusively affirms that he has no claim to the property. *Stumph v. Reger*, 92 Ind. 286. It cuts off every claim, whatever be its form or character. But the claim which the appellant here seeks to enforce is a claim to an estate or interest in the land itself. An easement is an interest in land. *Burk v. Hill*, 48 Ind. 52; *Douglass v. Thomas*, 103 Ind. 187. It is so completely an estate or interest in land that an action will lie to quiet title to it. *Davidson v. Nicholson*, 59 Ind. 411. We think it very clear, that, where title has been quieted in the owner of the fee, a claim to an easement is conclusively adjudicated, and can not again be asserted. But if it were simply a claim, clouding the owner’s right, it would be adjudicated.”

Justice Harlan, speaking for the supreme court of the United States in *Adams v. Henderson*, 168 U. S. 573, said:

“A good and indefeasible title in fee imports such ownership of the land as enables the owner to exercise absolute and exclusive control of it as against all others.”

See, also, *Van Rensselaer v. Poucher*, 5 Denio 35; *Miller v. Calvin Phillips & Co.*, 44 Wash. 226, 87 Pac. 264.

It seems plain to us that appellant was unable to convey "A full fee simple title" to respondents, his land being subject to this easement. He was not enabled "to exercise absolute and exclusive control of it as against all others," using the language of Justice Harlan above quoted.

Counsel for appellant rely upon the literal words of the contract, that the title was to be "free and clear from taxes, mortgages, and other liens." From which it is argued that the enumeration of encumbrances of this particular class excludes the idea that appellant's title is to be free from all other encumbrances. This enumeration, however, we do not think lessens the force of the words "full fee simple title." It will be noticed that the enumerated encumbrances are only liens upon the land, such as could be satisfied by the payment of money, while the easement with which the land is burdened is something more in its effect than a mere lien. It actually lessens appellant's present dominion and control over the land. In other words, it renders his title less than a "full fee simple title." Those words, we think, constitute the agreement to furnish a title free from the burden of such easement.

Some contention is made that, notwithstanding the existence of this easement, appellant in any event has marketable title to the land. We are not able to adopt this view. In 26 Cyc. 818, "marketable title" is defined as "a term which when applied to real estate is used to designate a title free from reasonable doubt." 19 Am. & Eng. Ency. Law (2d ed.), 1138; 1 Warvelle, Vendors (2d ed.), §§ 46, 299. We do not think that the question of marketable title is involved here at all. It is clear that appellant has not a "full fee simple title to the land." There is no doubtful question as to this. If it could be made to appear with reasonable certainty that this easement did not in fact exist, though there was a bare possibility that it might exist, we would have a case involving this contention; but we know that it does exist and that ap-

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Statement of Case.

pellant's title is impaired to that extent. It may be that this easement is comparatively only a slight hinderance to full enjoyment of the land by appellant, but the certainty of its existence renders it such that respondents were not obliged to accept the title offered by appellant, in view of the expressed terms of the contract.

Other alleged imperfections in appellant's title are pointed out by counsel for respondents, but since we conclude that the one we have discussed is sufficient to sustain the trial court's disposition of the case, the others do not require discussion here.

We are of the opinion that the rights of the parties have been correctly determined by the trial court. Its judgment is therefore affirmed.

DUNBAR, C. J., MOUNT, FULLERTON, and GOSE, JJ., concur.

[No. 9440. Department One. July 20, 1911.]

DELLA M. COOPER, *Respondent*, v. W. W. H. COOPER,
Appellant.¹

DIVORCE—ALIMONY—ATTORNEY'S FEES—REASONABLENESS. An allowance of \$25 per month alimony and \$150 attorney's fees is not unreasonable, where it appears that defendant was thirty-six years of age, in good health, engaged in the insurance business, and capable of earning considerable money.

Appeal from a judgment of the superior court for King county, Lindsay, J., entered December 11, 1909, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for divorce. Affirmed.

William R. Bell, for appellant.

Jay C. Allen, for respondent.

¹Reported in 116 Pac. 673.

PER CURIAM.—In this case a decree was entered at the suit of the respondent, the plaintiff below, dissolving the marriage relation existing between the plaintiff and defendant. The decree further provides that, until the plaintiff remarries or until the further order of the court, the defendant shall pay her the sum of \$25 per month, commencing December 1, 1909, and that he shall pay her the sum of \$150 as attorney's fees. The defendant has appealed from that part of the decree awarding alimony and attorney's fees to the plaintiff.

The record shows, and the court found, that the appellant is thirty-six years of age, in good health, engaged in the insurance business, and capable of earning considerable money. A discussion of the evidence would serve no useful purpose. It suffices to say that the allowance of the alimony and attorney's fees is not unreasonable.

The decree is affirmed, and the clerk of the court is directed to enter a judgment against the appellant and his sureties on the supersedeas bond, for the amount of the alimony from December 1, 1909, at \$25 per month, with legal interest on each of the payments, and for an attorney's fee of \$150 and costs of the appeal. The judgment shall provide for its remission to the superior court for further proceedings in accordance with this opinion.

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Opinion Per Gose, J.

[No. 9527. Department One. July 20, 1911.]

JOHN FRIES *et al.*, Respondents, v. FRANKLIN M. LOCKWOOD
et al., Appellants.¹

APPEAL—REVIEW—FINDINGS. A finding of a rescission of a contract on May 5, will not be disturbed because the only evidence of a rescission was on the 2d and 3d, it not appearing that the court attached importance to the date.

REPLEVIN—EVIDENCE—FAILURE OF PROOF. A judgment in replevin for the return of two spans of mules and harness and wire fencing, or their value, cannot be sustained where the proof failed to show that defendant was in possession of the harness or wire fencing, and there was no evidence of the value of the mules disassociated from the harness.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered January 27, 1911, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action of replevin. Reversed.

Edward C. Mills, for appellants.

H. S. Blandford, John H. Pedigo, and Everett J. Smith, for respondents.

Gose, J.—This action was brought to recover the possession of certain personal property, or its value in case a delivery could not be had, and for damages for its detention. From a judgment in favor of the plaintiffs, the defendants have appealed.

The Fries will hereafter be referred to as if they were the sole respondents. The controversy arose out of a contract between the respondents and the appellants for an exchange of properties. The contract provides that, if the exchange fails in consequence of defects in the title to the respondents' property, the appellants shall retain two spans of mules, selected by them, as liquidated damages by reason of their

¹Reported in 116 Pac. 640.

having given the respondents the possession of their property. The respondents had no title to a part of the property which they agreed to convey.

The complaint alleges, that the appellants, on or about May 5, 1910, notified the respondents that they rescinded the contract and would not comply with its terms, and that the respondents then agreed to the rescission; that prior to the date of the rescission, the appellants wrongfully took, and still hold, possession of two spans of mules of the value of \$1,100, two sets of harness of the value of \$100, and two rolls of wire fencing of the value of \$28, and that the net value of the use of the mules is one dollar per day per span. The appellants, in their answer, deny a rescission upon their part; allege a defect in the title to a part of respondents' property; allege that the respondents breached the contract; admit possession of the mules; deny possession of the harness and wire; and deny the averment as to the value of the property and the value of its use. The contract is dated March 22, 1910.

There are no findings of fact other than those contained in the judgment. The judgment recites that, pursuant to the contract, the respondents delivered to the appellants two spans of mules of the value of \$500 per span, two sets of harness of the value of \$50 per set, and two rolls of wire fencing of the value of \$28; that "on the 5th day of May, 1910," the appellants notified the respondents that they rescinded and would not perform the contract; that thereupon the respondents and the appellants, by mutual consent, rescinded and revoked the contract; and that the respondents have been deprived of the use of the personal property mentioned, to their damage in the sum of \$300. The judgment was entered for the recovery of the mules, harness, and wire, or in the alternative for \$1,128, in case a delivery could not be had, and for \$300 damages for the detention thereof.

The appellants urge, with great earnestness, that the finding of the court that they refused to perform the contract

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is against the preponderance of the evidence, and that the evidence shows that the exchange of properties failed of consummation in consequence of a defect in the title to a part of the respondents' property, and their refusal to substitute other property of equal value, as they were authorized to do under the contract. There is an irreconcilable conflict in the testimony on this question, and we have somewhat hesitatingly concluded to be controlled by the findings of the learned trial court. A review of the evidence would serve no useful purpose. The appellants further urge that practically the only evidence offered by the respondents in support of the finding that the appellants breached the contract, is to the effect that the appellant husband, declared, on May 2 and 3 respectively, that the "deal was off," and that he would not perform. They insist that the finding of the court that they rescinded on May 5 is a repudiation of the respondents' testimony as to the appellants' declarations on those dates. We are not disposed to attribute that importance to the date named in the finding. The court, no doubt, reached its conclusion upon all the evidence submitted upon both sides, and, after weighing it, resolved the case against the appellants.

We, however, find nothing in the record tending to show that the appellants at any time had possession of either the harness or the wire. They joined issue on this question in their answer, and the burden was, of course, on the respondents to prove their possession. Nor do we find in the record any evidence of the value of the mules, disassociated from the harness. In the contract for an exchange of properties, a valuation of \$550 was placed upon each span of mules with harness. The respondent John Fries, while testifying, was asked by the court to state the reasonable rental value of the mules, and answered: "These mules were priced to Lockwood at \$1,100 with the harness," and that they were worth one dollar per day. There is no other evidence of the value of the mules, or of the value of the mules with the harness. The

judgment, as we have seen, is for a return of the two spans of mules, two sets of harness, and two rolls of wire, or for \$1,128, "the value thereof" in case a delivery cannot be had. If there was any evidence of the value of the mules, standing alone, we would direct a modification of the judgment to that amount; but there is no such evidence.

The appellants complain that the damages awarded for a detention of the property are excessive, viewed in the light of a reasonable interpretation of the evidence. If we could finally determine the case here, we would be disposed to reduce the damages to \$200. We do not think the evidence before us justifies a larger recovery.

The judgment is reversed, with directions to grant a new trial upon the question of the possession and value of the personal property and the damages resulting from its detention. The appellants will recover the costs of the appeal.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ., concur.

[No. 9397. Department One. July 20, 1911.]

EDWIN D. HARDING, *Appellant*, v. OSTRANDER RAILWAY
AND TIMBER COMPANY, *Respondent*.¹

MASTER AND SERVANT—INCOMPETENT FELLOW SERVANT—PLEADING—COMPLAINT. A complaint alleging the incompetence of plaintiff's assistant, by reason of deafness, a fact known to the defendant and not known to the plaintiff, and that plaintiff was injured by reason of stopping to give a second warning to protect the assistant and property in his care, states a cause of action.

SAME—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCIES—PLEADING—COMPLAINT. A timber faller, injured by a falling tree, is not shown to be guilty of contributory negligence by his complaint alleging that, by reason of the deafness of his assistant, a fact known to the defendant and not known to him, he was compelled to remain in a place of danger to give a second warning to the assistant and to remove a cross-cut saw which it was the assistant's

¹Reported in 116 Pac. 635.

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Opinion Per Gose, J.

duty to remove; contributory negligence not being imputable to acts in emergencies to save human life, and acts to save property being measured by the standard of ordinary prudence in like situations.

SAME—NEGLIGENCE—MEDICAL TREATMENT—FREE TRANSPORTATION TO HOSPITAL. A lumber company that withholds a hospital fee from the wages of employees, for maintaining a hospital, is under an implied obligation to furnish free transportation to an employee, injured and prostrate in the woods, where it had a logging road with engines and equipment at hand for conveying him to the hospital; and is liable for injuries resulting from unreasonable delay in so doing.

DAMAGES—MINIMIZING LOSS—PLEADING—COMPLAINT. A complaint alleging that the plaintiff was prostrate in the woods, sufficiently shows that the aggravation of injuries from defendant's delay in conveying him to the hospital was not due to the neglect of the plaintiff.

ACTIONS—JOINDER—CONTRACT AND TORT—CAUSES ARISING FROM SAME TRANSACTION—MASTER AND SERVANT. Where an employer maintained a hospital by hospital fees retained from wages of employees, causes of action for personal injuries sustained through the employment of incompetent fellow servants, and for failure to use reasonable diligence in carrying plaintiff to the hospital for treatment, both spring from contractual relations, even if one sounds in tort and the other in contract; and in any event, may be joined under Rem. & Bal. Code, § 296, providing that the plaintiff may unite several causes of action when they all arise out of the same transaction.

PLEADING—DEMURRER—SEPARATE STATEMENT OF CAUSES. An objection that causes of action are not separately stated cannot be raised by demurrer, but only by motion.

Appeal from a judgment of the superior court for Cowlitz county, McMaster, J., entered October 5, 1910, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries sustained by a logger in the falling of a tree. Reversed.

B. B. Adams and Isham N. Smith, for appellant.

Joseph O'Neil and Wilbur & Spencer, for respondent.

Gose, J.—The plaintiff has appealed from an order sustaining a demurrer to the amended complaint and dismissing

the action. The complaint is of too great length to be set forth in full, but in substance it alleges that, at the time the appellant sustained the injuries of which he complains, he was an able-bodied man in the employ of respondent as a head timber faller; that he had been in its employ for a period of eleven months; that during that time the respondent had an established rule governing its employees by which it exacted and withheld from their wages the sum of one dollar per month, which it used in the maintenance of a hospital for the care and treatment of its injured employees; that he had as an assistant one Schultz, who was extremely hard of hearing and therefore incompetent to discharge his duties; that such infirmity and incompetency were known to the respondent and unknown to the appellant; that it was a part of the appellant's duties as head faller to warn his assistant of danger from falling trees; that while the appellant and Schultz were falling a large tree, the former notified the latter of its falling in time for both to have escaped danger, and that,

"At the time and place aforesaid, and after this plaintiff had notified the said John Schultz in time to have permitted both plaintiff and the said John Schultz to have escaped from danger of said falling tree, the said John Schultz, owing to his deafness, failed to hear the warning and failed to escape or get out of the reach of danger; and plaintiff was thereby compelled to remain at the place of danger and further and again notify John Schultz the second time of the danger of the falling tree, and was further forced to discharge duties which were the duties of the said John Schultz, to wit, that it was part of the duty of the said John Schultz to care for a large cross-cut saw which plaintiff and John Schultz used in the business of falling trees, and that it was further the duty of John Schultz upon receiving a warning from this plaintiff to take said saw out of the place of danger, and to immediately act in response to notifications of warnings for danger. That by reason of the said delay on the part of said John Schultz, this plaintiff was compelled to and did care for and remove the cross-cut saw to prevent additional danger, and by reason of the delay caused by the incompetency of the said John Schultz, the tree upon which plaintiff and

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John Schultz was there working was felled in such a manner that a large limb was broken off from said tree and in falling therefrom the said large limb fell upon and against plaintiff before plaintiff had time to attend to his duties above stated and remove himself from the place of danger, and that by such falling limb hitting plaintiff's body, plaintiff was thereby prostrated and violently stunned, and his left arm and shoulder were bruised, maimed and crushed, and the bones of his left arm were lacerated."

It is further alleged that, immediately after the injury, the respondent was notified thereof by notice to its secretary, who had charge and control of its business and whose duty it was, among other things, to send engines or trains or means of transportation into the woods to receive any of its injured servants and convey them to its hospital; that having at hand a logging road with rolling stock and engine "fired up," which it could have sent to the immediate relief of the appellant, it disregarded the notice, and failed, neglected, and refused to send means of transportation to him to convey him to the hospital, for the period of one day; that with knowledge of his condition, it permitted him to remain prostrated and without medical aid during that time, and that by reason of the delay in conveying him to the hospital for treatment, his injured arm became so swollen that, when he was taken to the hospital on the following day, it was impossible for the attending physician to render him any service for a period of about six days.

It is further alleged that, by reason of the several acts of the respondent, the appellant suffered, and will continue to suffer, greivous bodily pain and mental anguish; that he is broken in health and body, and that his arm is atrophied and withered so as to prevent him from working at any trade or business, to his damage in the sum of \$67,094. The demurrer was interposed upon two grounds: (1) that several causes of action have been improperly united; and (2) that the complaint does not state facts sufficient to constitute a cause of action. The order sustaining the demurrer is silent

as to whether the court sustained it upon one or both of the grounds. The order of dismissal was entered because the appellant declined to plead further.

We will first consider the second ground of the demurrer. Briefly re-stated, the complaint alleges that the appellant's assistant was incompetent by reason of his deafness, a fact known to the respondent and unknown to the appellant; that the appellant received the injury by stopping to give a second warning to his assistant and to remove a cross-cut saw which it was the duty of the assistant to protect. It is well settled that, in proper cases, the servant may recover damages from the master where he is injured through the incompetency of a fellow servant, and the master knew and the servant did not know of such incompetency. 4 Thompson, Negligence, § 4048. The complaint does not show that the appellant was guilty of such negligence as will preclude a recovery.

"Where a servant is injured as the result of an act done by him under an impulse or on a belief created by a sudden danger caused solely by the master's negligence, he is not to be regarded as guilty of contributory negligence, even though the act would be regarded as a negligent one if performed under circumstances not indicating sudden peril. If, however, the emergency in which the servant acts is of his own making, the master cannot be held liable on the theory that it had by its negligence placed him in such a position as to relieve the servant of the duty of exercising ordinary care for his own safety.

"A servant is not guilty of contributory negligence where he is injured while attempting, in the face of imminent danger, to avert an accident or to save the lives of others, unless the attempt is made under circumstances constituting rashness in the judgment of prudent persons.

"Contributory negligence will not be imputed to a servant where he is injured while making a reasonable effort to save his master's property in an emergency, even though his own acts, in connection with others, occasioned the threatened danger, where his acts were not culpable." 26 Cyc. 1274-6. See, also, Labatt, Master and Servant, §§ 360, 361; *Prophet*

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v. Kemper, 95 Mo. App. 219, 68 S. W. 956; *Omaha etc. R. Co. v. Krayenbuhl*, 48 Neb. 553, 67 N. W. 447; *Schroeder v. Chicago & A. R. Co.*, 108 Mo. 322, 18 S. W. 1094, 18 L. R. A. 827; *Maryland Steel Co. v. Marney*, 88 Md. 482, 42 Atl. 60, 71 Am. St. 441, 42 L. R. A. 842; *Peyton v. Texas & Pac. R. Co.*, 41 La. Ann. 861, 6 South. 690, 17 Am. St. 430. The rule, where one acts in a sudden peril to save human life, is admirably stated in *Peyton v. Texas & Pac. R. Co.*, *supra*, as follows:

“When one risks his life, or places himself in a position of great danger, in an effort to save the life of another, or to protect another who is exposed to a sudden peril, or in danger of great bodily harm, it is held that such exposure and risk for such a purpose is not negligent. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons.”

The rule is not so liberal where one exposes himself to danger to protect property, especially where, as here, the property was of inconsiderable value. It seems to us that, in such a case, the conduct of the appellant as applied to his efforts to save the cross-cut saw should be measured by the standard of ordinary prudence; that is, by what the ordinarily prudent person similarly situated would have done. *Labatt, Master and Servant*, § 361.

We think, also, that the facts alleged in the complaint show that there was an implied duty upon the respondent to proceed with reasonable diligence to convey the appellant to the hospital. It is alleged, that a hospital fee was exacted and withheld; that the appellant was prostrated; that the respondent had a logging road with engines and equipment at hand for conveying the appellant to the hospital; that it knowingly left him lying prostrated for a period of twenty-four hours, and that his pain and suffering were augmented and his damages otherwise aggravated thereby. The rule of an implied liability to furnish free transportation to a

hospital, when hospital fees are withheld from the wages of the employee, has usually been applied to common carriers. But we think the same obligation arises from the facts alleged here. *Gulf etc. R. Co. v. Harney* (Tex. Civ. App.), 54 S. W. 791; *St. Louis Southwestern R. Co. v. Reagan*, 79 Ark. 484, 96 S. W. 168, 7 L. R. A. (N. S.) 997; *Illinois Cent. R. Co. v. Gheen*, 112 Ky. 695, 66 S. W. 639, 68 S. W. 1087; *Louisville etc. R. Co. v. Spinks*, 104 Ga. 692, 30 S. E. 968.

But the respondent suggests that the appellant cannot recover the additional damages arising from a failure of the respondent to furnish transportation to the hospital, because when the respondent failed in the performance of that duty, it was the appellant's duty to make reasonable efforts to reach the hospital. This argument overlooks the averment in the complaint that the appellant was left lying prostrated in the woods. The reasonable inference from the complaint is that the appellant was so prostrated from the shock and from the injury that he was unable to care for himself. It is, of course, elementary that, when the appellant found that the respondent would not convey him to the hospital, it was his duty, if physically and mentally able, to make reasonable efforts to minimize the damages; that is, to get to the hospital or to otherwise secure medical assistance, and that if he failed to do so, or to the extent that he did not do so, there is no liability upon the respondent for the damages occasioned thereby. In other words, it was the appellant's duty to act as a man of ordinary prudence would have acted under the circumstances, and if he failed to do so, the respondent is not liable for the damages flowing from his own negligence.

The respondent next contends that two causes of action, the one sounding in tort and the other springing from contract, are united, and that it is not permissive under the code to unite a cause of action *ex delicto* with a cause of action *ex contractu*. A reference to *Louisville etc. R. Co. v. Spinks*, *supra*, where the various definitions of tort by the textwriters

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are collected, will disclose that the differences in legal meaning between a tort and a contract are often extremely shadowy and indistinct. For instance, Mr. Bishop, in his work on Non-Contract Law, § 4, says:

“The word ‘tort’ means nearly the same thing as the expression ‘civil wrong.’ It denotes an injury inflicted otherwise than by a mere breach of contract; or, to be more nicely accurate, a tort is one’s disturbance of another in rights which the law has created either in the absence of contract, or in consequence of a relation which a contract had established between the parties.”

All the injuries complained of in the case at bar have their origin in contract. In the contract of employment there was an implied obligation upon the respondent to use reasonable efforts to surround the appellant with reasonably competent fellow servants. If the respondent knowingly employed an incompetent assistant, it breached its contract obligation. As we have seen, upon the facts pleaded there was also an implied contract obligation on the respondent to furnish the injured employee with transportation to its hospital. It is patent, therefore, that, in the larger sense, the entire cause of action springs from contractual relations.

Assuming, however, that the injury from the falling limb rests in tort, we think the causes of action may be joined under the 8th subdivision of the statute, Rem. & Bal. Code, § 296. It provides that the plaintiff may unite several causes of action in the same complaint, where they all arise out of the same transaction. Broadly speaking, there was here but one transaction. The appellant was employed to labor for the respondent. A part of his wages was exacted and withheld for hospital fees. He was injured while engaged in the performance of his duties, in consequence of the respondent’s negligence, and it failed in its duty to use reasonable diligence to carry him to the hospital for medical treatment. A reference to the complaint will disclose that the wrongs alleged and the injuries sustained are so interwoven that they can-

not be heard in separate trials. The injuries, pain, and suffering arising from the broken arm, and those arising from the failure to treat the injury with reasonable promptness, cannot be separated without resorting to speculation and conjecture. Subdivision 8 is not susceptible of any other reasonable interpretation without limiting it to the cases enumerated in the preceding subdivisions, and it is patent that the law-makers intended no such limitation. In *Clark v. Great Northern R. Co.*, 31 Wash. 658, 72 Pac. 477, and kindred cases, this court has held that actions *ex delicto* and actions *ex contractu* cannot be joined, but the provisions of subdivision 8 of the statute were not there involved. Mr. Pomeroy, in his Code Remedies (3d ed.), § 463, says:

“If all the other requisites of the statute are complied with, legal causes of action of the most dissimilar character—for example, contract and tort—may be united in one proceeding, provided they all arise out of the same transaction, or out of transactions connected with the same subject of action.”

See, also, *Id.*, §§ 468, 469.

It is true that the causes of action are not separately stated; but where they are properly joined, that question can only be raised by a motion to require the pleader to separately state them. *Moore v. Brownfield*, 10 Wash. 439, 39 Pac. 113; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95.

The judgment is reversed.

DUNBAR, C. J., FULLERTON, MOUNT, and PARKER, JJ.,
concur.

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[No. 9499. Department One. July 20, 1911.]

W. T. WILLIAMSON, *Appellant*, v. SNOHOMISH COUNTY,
Respondent.¹

COUNTIES—COUNTY COMMISSIONERS—CONTRACTS—AUTHORITY—EMPLOYMENT OF ALIENIST TO ASSIST PROSECUTING ATTORNEY. Under Rem. & Bal. Code, § 3890, conferring upon county commissioners the general management of county expenditures and business, they have authority to employ an alienist when his services are necessary to aid the prosecuting attorney in connection with the defense of insanity in a prosecution for homicide; and such employment is not unauthorized as relating only to judicial business.

Appeal from a judgment of the superior court for Snohomish county, Black, J., entered January 20, 1911, upon sustaining a demurrer to the complaint, dismissing an action on contract. Reversed.

Gordon D. Eveland and Marion A. Butler, for appellant.

Ralph C. Bell, for respondent.

PARKER, J.—The plaintiff commenced this action to recover from Snohomish county the sum of \$950, upon a contract for his services as an alienist rendered in connection with the trial of a defendant upon a charge of homicide involving the defense of insanity. The county's demurrer to the plaintiff's complaint being sustained by the superior court, he elected to stand thereon and not plead further, when judgment of dismissal was rendered against him, from which he has appealed.

The only question presented by counsel is as to the power of the county commissioners to authorize the prosecuting attorney to enter into the contract sued upon. The allegations of the complaint necessary for us to notice are as follows:

"(7) That, by reason of the plea of insanity so interposed by said defendant as a defense to the charge set forth in said

¹Reported in 116 Pac. 675.

information, the said prosecuting attorney deemed it necessary, and it was necessary, to have and employ a skilled and experienced alienist to become a witness and to aid said prosecuting attorney in acquiring necessary information to intelligently prosecute the said cause; and that, by reason of the interposition of said plea of insanity by said defendant, and by reason of the necessity arising therefrom, requiring the employment of a skilled and experienced alienist, the said board of county commissioners finding that it was necessary to employ a skilled and experienced alienist to assist said prosecuting attorney in the manner as aforesaid, said board of county commissioners acting for and on behalf of said county, and as it, in good faith believed, for the best interests of said county, authorized and empowered said prosecuting attorney to procure, upon the terms and for the purposes stated in paragraph VIII hereof, the services of plaintiff herein, a citizen of the state of Oregon, residing at Portland, Oregon, he, the said plaintiff, then and there being an alienist of wide experience and recognized ability and learning upon the subject of insanity.

“(8) That, in the month of October, 1908, said prosecuting attorney acting as such officer, and as he, in good faith believed for the best interest of said county, and in pursuance of the previous authorization of said board of county commissioners, entered into a contract for and on behalf of said county with said plaintiff, by the terms of which said plaintiff was employed particularly to qualify himself to become a witness in the above-entitled cause by attending court during the entire time in which the testimony should be taken; by reviewing and familiarizing himself with the authorities upon the subject of insanity and mental diseases and by carefully studying the facts as shown by the evidence from the standpoint of insanity and mental diseases, and to hold himself in readiness both before and during the course of the trial, to give to said prosecuting attorney such information within his knowledge respecting the subject of insanity and mental diseases as said prosecuting attorney might ask for, and to make a personal examination of the defendant if such examination should be desired; that it was further agreed by the terms of said contract that said plaintiff, for and in consideration of the services so to be rendered, should receive the sum of one hundred dollars for the first day

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that he should be in attendance upon the above-entitled cause for the purposes contemplated by said contract, and fifty dollars a day for each and every day thereafter that he should be required to attend the above-entitled court in connection with said cause. That said sum so contracted, to be paid to said plaintiff, is, and for many years has been, the regular and customary fee for such services.

“(9) That said cause came on for trial on the 12th day of October, 1908; and said plaintiff, in compliance with the terms of said contract, attended the same and was present in court as required, under and by virtue of the terms of said contract, during the entire period in which the testimony submitted therein was being introduced; that said plaintiff carefully listened to and studied said testimony, reviewed and studied the authorities upon the subject of insanity and mental diseases; held himself in readiness to and did give to said prosecuting attorney such information in reference to the subject of insanity and mental diseases as said prosecuting attorney asked him for; held himself in readiness to make a personal examination of the said John H. Jahn, if such examination should be desired, and finally became a witness in said cause, giving to the court and jury his opinion as to the insanity or mental irresponsibility of said John H. Jahn and stating his reasons therefor, based upon his particular preparation and study of this particular cause. That said plaintiff was in attendance upon such trial in pursuance of the terms of said contract for the period of eighteen days, and in accordance with the terms thereof, is entitled to the sum of \$100 for the first day so in attendance, and \$50 for each and every day thereafter.”

The statutory provisions which must be relied upon to sustain appellant's contention that this contract is within the power of the county commissioners to make, or authorize the making of, in behalf of the county are found in Rem. & Bal. Code, § 3890, as follows:

“The several boards of county commissioners are authorized and required . . .

“(5) To allow all accounts legally chargeable against such county not otherwise provided for, and to audit the accounts of all officers having the care, management, collection,

or disbursements of any money belonging to the county or appropriated to its benefit;

"(6) To have the care of the county property and the management of the county funds and business. . . ."

This has been the law since early territorial days, and a large part of the county expenditures made by the boards of county commissioners rest upon no other authority.

In the early case of *Martin v. Whitman County*, 1 Wash. 533, 20 Pac. 599, commenting upon this section and the authority it gives for incurring expense in the administration of the county affairs, the court said:

"By this section, taken in connection with other provisions of the statute not necessary to cite here, the board of county commissioners are given a sort of supervisory power over the affairs of the county. They are made the business agents, so to speak, of the county. They have the care and management of the county funds and county business. And while they have no direct authority over, or power to interfere with, the several county officers in the discharge of their respective duties, yet they have the power, and it is made their duty, to care for the county property, and manage the county funds and business, and in the exercise of such powers they may, if they see fit, employ experts to examine the books of county officers; they may employ private counsel to assist the district attorney in defending the county against suits brought against it, or in prosecuting suits in behalf of the county against others; and, as in the case at bar, they may employ persons to make compilations or transcripts from any of the county records whenever, in their judgment, the interests of the county may require it."

In the case of *State ex rel. Thurston County v. Grimes*, 7 Wash. 445, 35 Pac. 361, discussing the obligations of the state and county for expenses incurred in the administration of the criminal laws, the court said:

"The general rule under our system of county organization is, that the counties are burdened with the entire cost of the administration of the criminal laws within their boundaries; and, in turn, they receive and appropriate to their own use all fines and costs collected in criminal cases. . . .

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In unsuccessful prosecutions, no matter what the grade of the crime, they bear the entire expense; and in all cases they must, in the first instance, disburse for all such expenses, and are directly liable to officers, witnesses, jurors, etc."

Now it is not seriously contended, indeed, it could not be, but that the allegations of this complaint are sufficient to show that the services of appellant contracted for and rendered by him were necessary and a material aid to the proper prosecution of the accused, in view of his plea of insanity. Every lawyer of experience in the practice knows that there are many things necessary to be done in the proper and effectual preparation and trial of causes which involve the incurring of expense besides the mere compensation of attorney and statutory witness fees. These things are as necessary in securing the proper protection of the public rights in criminal prosecutions as well as when private rights only are in litigation. If the expenditure of county funds was limited in aiding prosecutions under the criminal laws only to the payment of attorneys and statutory witness fees, many of the most important cases could not be presented to the courts in such manner as to effectually protect the rights of the public. It seems to us that the power of the county commissioners to authorize the incurring of such an obligation as is here involved is as clearly inferable from these statutory provisions as is their authority to incur expenses in the conduct of the county's business in numerous other matters, in which it is conceded they have such authority, though not specifically provided for by statute.

Our attention is called to *Smith v. Lamping*, 27 Wash. 624, 68 Pac. 195; *Mather v. King County*, 39 Wash. 693, 82 Pac. 121, and *McElwain v. Abraham*, 58 Wash. 26, 107 Pac. 832, to support the county's contention; but a reading of these cases will show that in each one the commissioners were attempting to provide something at the county's expense in addition to that which the law had specially provided for in the particular matter involved.

Some contention is made that this contract does not involve county business, but that it relates to judicial business only. We cannot agree with this contention. It does not involve the payment of any court officer's salary or the expense of maintaining the courts; it does not involve the payment even of statutory witness fees although it incidentally involves a witness' compensation, yet much more than that, for it is evident that the services contracted for and rendered by appellant were more than that of a mere witness, and more than that which could have been coerced from him by a subpoena.

We are of the opinion that the judgment must be reversed and the county's demurrer overruled. It is so ordered, with directions to the superior court to proceed accordingly.

MOUNT, GOSE, and FULLERTON, JJ., concur.

[No. 9538. *En Banc*. July 22, 1911.]

VEYSEY BROTHERS, *Appellant*, v. BISHOP MILL COMPANY,
Respondent.¹

APPEAL—REVIEW—FINDINGS. Upon a square issue of fact, affirmed on one side and denied on the other, findings on conflicting evidence will not be disturbed on appeal unless against the clear preponderance of the evidence.

Appeal from a judgment of the superior court for Chehalis county, Sheeks, J., entered November 22, 1910, in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

O. M. Nelson, for appellant.

W. H. Abel, for respondent.

PER CURIAM.—The only question involved in this case is one of fact. Parker & Simmons, thereafter Simmons, en-

¹Reported in 116 Pac. 843.

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gaged to cut a certain quantity of shingle bolts, and deliver them to respondent at its mill in Montesano, at the agreed price of three dollars per cord. An arrangement was made whereby credit was to be extended by appellant to Parker & Simmons. It is contended by appellant that respondent obligated itself to pay the board and commissary bill of all the men, an account of which was from time to time rendered by appellant. The original obligation assumed by respondent is contained in a letter to Parker & Simmons, and is as follows:

"We will advance you on the above price one dollar per cord as the bolts are split on the land, and will furthermore advance as part of the above price provisions sufficient for yourselves and an extra man for a term of two or three months while you are engaged in cleaning out the creek and getting the proposition in shape to deliver bolts from it."

Appellant says that thereafter respondent agreed to stand good for all supplies for all the men employed, the cost of which was to be deducted from the labor checks; this without reference to the amount due on the contract. There is a square issue of fact, affirmed by one and denied by the other. In such cases we are inclined to follow the judgment of the trial judge, unless it appears to be against the clear preponderance of the testimony. Barring some inconsequential items not now necessary to be discussed, the contentions of respondent were sustained below, and for the reasons assigned are now sustained.

Judgment affirmed.

[No. 9365. Department One. July 22, 1911.]

GEHRI & COMPANY *et al.*, Appellants, v. WILLIAM M. DAWSON
et al., Respondents.¹

CONTRACTS—PERFORMANCE—WAIVER OF WRITTEN NOTICE OF EXTRAS. A provision in a building contract requiring the contractor to give written notice regarding extra work may be waived by an oral agreement to pay for the same as extra work, or by a course of conduct regarding changes from the plans.

TRIAL—INSTRUCTIONS—FACTS ASSUMED. An instruction upon demurrage charges may properly assume that the parties had waived provisions requiring written notice of extra work, where that was the established fact.

CONTRACTS — PERFORMANCE — DEMURRAGE — QUESTION FOR JURY. Where a technical compliance with the terms of a building contract with reference to changes has been waived by the owner and changes from the plans have been made by oral agreement, it is for the jury to say whether the changes and extra work warranted an extension of the time for the completion of the work so as to avoid demurrage charges.

Appeal by plaintiffs from a judgment of the superior court for Pierce county, Shackleford, J., entered August 8, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action on contract. Affirmed.

Boyle, Warburton & Brockway, for appellants.

Stevenson & Sorley, for respondents.

FULLERTON, J.—On December 14, 1908, the appellants, being then the owners of a certain brick building situated in the city of Tacoma, known as Parker's Hall, entered into a contract with the defendants Dawson, Poindexter & Company, by the terms of which the latter named company agreed to remodel the building and erect an addition thereto, according to certain plans and specifications, at the agreed price of \$6,910. The contract provided that the work should be completed on or before March 2, 1909, and pro-

¹Reported in 116 Pac. 673.

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vided a forfeiture of \$5 per day for every day the completion of the building should be delayed beyond that date. The contract also contained the following provisions:

"(3) No alterations shall be made in the work shown or described by the drawings and specifications, except upon a written order of the architect, and when so made, the value of the work added or omitted shall be computed by the architect, and the amount so ascertained shall be added to or deducted from the contract price. In the case of dissent from such award by either party hereto, the valuation of the work added or omitted shall be referred to three disinterested arbitrators, one to be appointed by each of the parties to this contract, and the third by the two thus chosen; the decision of any two of whom shall be final and binding, and each of the parties hereto shall pay one-half of the expense of such reference."

"(7) Should the contractor be obstructed or delayed in the prosecution or completion of his work by the act, neglect, delay or default of the owner, or the architect, or of any other contractor employed by the owner upon the work, or by any damage which may happen by fire, lightning, earthquake or cyclone, or by the abandonment of the work by the employees through no default of the contractor, then the time herein fixed for the completion of the work shall be extended for a period equivalent to the time lost by reason of any or all of the causes aforesaid; but no such allowance shall be made unless a claim therefor is presented in writing to the architect within twenty-four hours of the occurrence of such delay. The duration of such extension shall be certified to by the architect, but appeal from their decision may be made to arbitration, as provided in the third section of this contract.

"(8) The owner agrees to provide all labor and materials not included in this contract, in such manner as not to delay the material progress of the work, and in the event of failure so to do, thereby causing loss to the contractor, agrees that he will reimburse the contractor for such loss; and the contractor agrees that if he shall delay the material progress of the work so as to cause any damage for which the owner shall become liable (as above stated), then he shall make good to the owner any such damage. The amount of such loss or damage to either party hereto shall, in every case, be fixed and

determined by the architect or by arbitration, as provided in the third section of this contract.”

The contractors entered upon the work immediately after the execution of the contract, and completed the same some time after the date fixed by the contract for its completion, the exact time not appearing in the evidence. The contractors, however, failed to pay certain materialmen who furnished materials used in the new construction and in the repair of the old building, and liens were filed therefor and judgments obtained thereon, which the appellants were obliged to pay to avoid a sale of the property. These sums, together with the sums paid on the contract price as the work progressed, sums paid for materials which the contractors agreed to furnish, and sums claimed for damages for defective work, greatly exceeded the contract price, and this action was brought against the contractors and their bondsmen to recover the difference. The amount claimed in the complaint was \$2,685.96. The contractors and the bondsmen filed separate answers. The contractors put in issue many of the allegations of the complaint, and claimed large sums for extra work and damages for loss of time caused by the omissions and neglects of the owners, which offset the claims of the owners and left a balance in their favor of \$1,573.33. The bondsmen denied liability altogether. On the issues made, a trial by jury was had, which resulted in a verdict and judgment in favor of the owners for \$761.71. The owners felt themselves aggrieved at the verdict and judgment and prosecuted this appeal therefrom.

The appellants first contend that the court erred in its instruction to the jury regarding the question of extra work performed by the contractors, arguing that the instruction given permitted the jury to disregard the express provisions of the contract in that respect. The instruction given was as follows:

“Where a contract provides that written notice must be given in regard to any extra work or that there is to be a

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written order before any work shall be regarded as extra work, that is such a provision as the parties may by their conduct waive in the course of the work on the contract. For instance, if the owner of the building enters into an agreement to pay a certain price for extra work without requiring the written notice or statement about the matter to be made, the making of such an agreement would be a waiver of any right to enforce the clause about the necessity of a writing. In other words, here are parties who are going ahead under an agreement that provides that certain things shall be done in writing. Now it does not mean that under no circumstances can there be a recovery for extra work unless the writing is made, but the contract means that unless the other party waives, by his conduct and acts, the right to demand such writing, there shall be no recovery, and if you find that there was a course of conduct between the parties which amounted to a waiver of the necessity of the writing in regard to extras, then you should allow recovery for extras, whether or not writing existed. If you find that verbal orders were made for extra work and the work was done pursuant to such verbal orders, you would be justified in allowing for such extra work, or even if no order was given beforehand, if the work was done and there was an agreement afterwards to pay for it, you would be allowed to find in favor of the contractor on such extra work; otherwise, however, your finding should be against the allowance for such extra work."

But the instruction was founded on the evidence. Whether the conduct of the parties amounted to a waiver of this clause of the contract was properly left to the jury.

It is also claimed that the instruction with reference to the question of demurrage was objectionable. But here, again, there was evidence tending to support the theory of the court. The building was found to be in somewhat worse condition than either of the parties anticipated. The building was found out of plumb, with the floors sagged and out of level, and when the foundations were exposed it was deemed best to strengthen them by an additional pillar. These, and matters of like character, called for continual changes in the plans, and the parties, instead of following the methods

pointed out in the contract for making such changes, simply got together and agreed upon them orally. These facts warranted the court in assuming in his instructions to the jury that the parties had waived a technical compliance with the terms of the contract with reference to such changes, and that he did not err when he left it for the jury to say whether the delays caused by these many changes and the extra work caused thereby warranted an extension of time for the completion of the building.

The principal contention of the appellants is, however, that the verdict is not supported by the evidence. They argue that if the most extravagant claims made by the contractors be conceded, the amount thereof does not equal the appellants' admitted claims by more than \$1,140.90; whereas the verdict of the jury was for \$761.71 only. But while it may be difficult to ascertain from the record just which of the several items going to make up the accounts of the several parties the jury took into consideration in making up their verdict, we have found no difficulty in reaching the conclusion from the items submitted that the jury might have found a lesser sum due the appellants than they actually did find. We shall not, however, undertake in this opinion to demonstrate the fact. To set forth the items of the several accounts would but encumber the record to no useful purpose. We are satisfied no error was committed by the trial court, and the judgment will stand affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

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[No. 9430. Department One. July 22, 1911.]

H. T. SEGERSTROM, *Respondent*, v. R. T. LAWRENCE,
Appellant.¹

MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION WITH AUTOMOBILE—EVIDENCE—SUFFICIENCY. A verdict for injuries sustained by a pedestrian, run down by an automobile, is sustained by the evidence, where it appears that the automobile was driven after nine o'clock, on the left side of the street, without lights, that no warning was given, and that plaintiff exercised due care.

SAME—LAW OF ROAD—INSTRUCTIONS—APPEAL—HARMLESS ERROR. Where an automobile, driven on the left side of a street, struck a pedestrian, it is not prejudicial error to give an inaccurate instruction that the law requires vehicles to remain on the right side of the street and that a driver violating such law is bound to exercise a higher degree of care than if he were on the right side; in view of Rem. & Bal. Code, § 5558, requiring passing vehicles to seasonably turn to the right of the center of the road, and Id., § 5569, requiring automobiles on passing, to turn to the right, and the general "law of the road," arising from usage, requiring persons upon a continuously used street to keep upon the right side.

SAME—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action for personal injuries by a pedestrian struck by an automobile, while not commendable practice, it is not prejudicially erroneous to allow the plaintiff, after stating that he looked for vehicles before starting to cross the street, to give as his reasons for looking that his son had shortly before been injured while crossing; as the jury could not have been misled.

SAME. In an action for personal injuries by a pedestrian struck by an automobile, the arrest of the defendant and a bystander's request that defendant take the plaintiff home, immediately following the accident, is admissible in evidence as part of the general transaction.

WITNESSES—CROSS-EXAMINATION. Where the defendant testified that he had been acquitted in police court of any offense in connection with running down a pedestrian, it is proper, on cross-examination, to require him to state for what offense he was tried.

DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$300 in favor of a pedestrian, struck by an automobile, is not excessive, where the plaintiff was much bruised, suffered pain, and was ill and unable to attend to business for a considerable time.

¹Reported in 116 Pac. 876.

Appeal from a judgment of the superior court for Spokane county, Peck, J., entered November 26, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a pedestrian through a collision with an automobile. Affirmed.

Nuzum & Nuzum and *Geo. H. Armitage*, for appellant.

Guy B. Groff, for respondent.

FULLERTON, J.—The respondent, while walking across Main avenue, in the city of Spokane, collided with, or was run into and injured by, the appellant, who was driving an automobile. He brought this action to recover for the injury sustained. On a trial by jury a verdict and judgment was returned and entered in his favor, and this appeal followed.

The appellant complains that the evidence was insufficient to justify the verdict, but it is clear there was a case for the jury. The evidence on the part of the respondent tended to show that the collision occurred sometime after nine o'clock in the evening; that the automobile was being driven without lights, on the left-hand side of the street, reckoning from the direction in which it was going; that no warning was given of its approach by tooting a horn or otherwise; and that it was driven in a somewhat reckless manner. Evidence was introduced also tending to show due care on the part of the injured person. These facts made a *prima facie* case for the respondent, and it was for the jury to say whether the case was overcome by the evidence introduced on the part of the respondent.

The court, among other instructions, gave the following to the jury:

“The law of the road is that all vehicles should remain upon the right side of the street in the direction in which they are going, and that all drivers are presumed to know the law of the road, and should be guarded thereby; that a driver of a vehicle or automobile voluntarily violating the law of the road, and driving or riding along the wrong side of the street

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is bound to use a higher degree of care than if he were properly operating his automobile on the right side of the street."

This instruction, while not strictly accurate, was not prejudicial. The statute relating to the law of travel for vehicles upon a public highway requires that they shall seasonably turn to the right of the center of the way when passing another vehicle going in the opposite direction (Rem. & Bal. Code, § 5558); and the statute relating to automobiles requires the driver to turn to the right on meeting vehicles, teams or persons moving or headed in the opposite direction. Rem. & Bal. Code, § 5569.

" 'Seasonably turn' means that the travellers shall turn to to the right in such season that neither shall be retarded in his progress, by reason of the other occupying his half of the way which the law has assigned to his use, when he may have occasion to use it in passing. In short, each has the undoubted right to one-half of the way, whenever he wishes to pass on it; and it is the duty of each, without delay, to yield such half to the other." *Brooks v. Hart*, 14 N. H. 310.

There is a "law of the road" also, arising from usage and custom, which requires persons traveling upon a continuously used street or highway to keep upon the right side of such way. These are regulations to avoid collisions, and the one who neglects it and collides with another usually has the burden of explaining his conduct. But these rules are not inflexible. A person may lawfully use what is to him the left-hand side of the road if there is no travel at that time upon that part of the way, or if the travel is not so heavy as to make his conduct a source of danger. But a person upon the wrong side of the way must always exercise a care commensurate with his position. This is usually a higher degree of care than that required of him while on the correct side of the way. The instruction complained of, therefore, while correct as a general proposition, was not accurate under all circumstances. It was, however, relevant enough to the case in hand; that is to say, the case does not present a state of

facts rendering a more detailed statement of the general rule announced necessary, hence we can find no prejudice in the instruction given.

It is complained that the court erroneously permitted the respondent on direct examination to give his reason for being certain that he stopped and looked for vehicles passing along the street before attempting to cross the same just prior to the time he was injured. This, while a proper subject for cross-examination, had better have been omitted on the direct. The statement that he did stop and look for passing vehicles contained all of the facts material to be shown, and it is usually best to confine the witness on direct examination to the naked facts. Nevertheless, we cannot think the error prejudicial. The reason given was that an accident had befallen his son while crossing the street a short time before, and that this was in his mind when he approached the street for that purpose. The relation of this fact could have in no manner misled the jury. Such being the case, the burden of a new trial should not be required.

The arrest of the appellant, and the request of a bystander that the appellant take the respondent home in his automobile, occurred immediately following the accident and were properly shown as part of the general transaction. Moreover, testimony to the latter fact was offered for the purpose of contradicting the respondent. It was admissible also for that purpose.

On his direct examination the appellant testified, in response to interrogatories propounded by his counsel, that he was acquitted by the police justice of any crime in connection with the accident to the respondent. On cross-examination the respondent was permitted to ask him, over the objection of the appellant, what the offense was for which he was tried. This is assigned as error, but clearly it was proper cross-examination. The purpose of the appellant was to show that he had once been acquitted of fault in the matter at issue,

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and it was clearly pertinent to show what matters then before the jury were litigated in the police court.

Finally, it is claimed that the verdict is excessive. The amount of the verdict was \$300. The respondent testified that while he had suffered no permanent injuries, he was much bruised, and suffered pain and was ill for a considerable period after the hurt, and that during such time he was incapacitated to a large extent from carrying on his ordinary business. The verdict does not seem to us so far unreasonable as to warrant interference.

The judgment is affirmed.

DUNBAR, C. J., GOSE, PARKER, and MOUNT, JJ., concur.

[No. 9573. Department One. July 22, 1911.]

R. H. McELROY, *Respondent*, v. G. W. GATES, *Appellant*.¹

LIMITATION OF ACTIONS—BETWEEN NONRESIDENTS. Under Rem. & Bal. Code, § 178, a right of action arising in another state between nonresidents of this state, is not barred when it is not barred by the statutes of the state where it arose.

LIMITATION OF ACTIONS—LAWS OF OTHER STATE—NONRESIDENTS. Rev. Stat. of Missouri, 1909, § 1897, providing that if, when an action accrues against a resident of such state, he be absent therefrom, such action may be commenced within the time limited therefor after the return of such person to the state, only applies to persons who are residents of the state of Missouri when the action accrues.

LIMITATION OF ACTIONS—ACCRUAL IN OTHER STATE—FACT OF NON-RESIDENCE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. Where a resident of Missouri made a note, and left the state before its maturity, and claims that the note is now outlawed by the laws of such state because he was not a resident of the state at the time it accrued, it is incumbent upon him to prove his nonresidence at such time; and it is not sufficient to show that when the note matured he was roving about outside of the state with no fixed abode, the presumption being that he was temporarily absent and a resident of Missouri until he established a residence elsewhere.

GOSE, J., dissents.

¹Reported in 116 Pac. 845.

Appeal from a judgment of the superior court for King county, Albertson, J., entered January 24, 1911, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on promissory notes. Affirmed.

Higgins, Hall & Halverstadt, for appellant.

James W. Reynolds, for respondent.

MOUNT, J.—The plaintiff brought this action to recover upon four promissory notes, indorsed by the defendant, for whose benefit the notes were made. The case was tried to the court without a jury. Judgment was entered in favor of the plaintiff for the full amount of the notes. The defendant has appealed.

It appears that the four notes were executed on August 18, 1896, in the state of Missouri, where both parties then resided. The notes matured in twelve, eighteen, twenty-four, and thirty months, respectively, after date. After maturity of the first note and before the maturity of the other three, the defendant left the state of Missouri, and has never returned thereto. At the time this action was begun, the plaintiff was a resident of Missouri and the defendant was a resident of the state of Oregon. The action was brought in this state more than ten years after maturity of the last note. The defendant pleaded the statute of limitations, and now argues that, under the facts proven, the last three notes are barred. Our statute upon the question is as follows:

“When the cause of action has arisen in another state, territory, or country between nonresidents of this state, and by the laws of the state, territory, or country where the action arose an action cannot be maintained thereon by reason of the lapse of time, no action shall be maintained thereon in this state.” Rem. & Bal. Code, § 178.

The cause of action arose in another state. The parties are nonresidents of this state. One of them is a resident of Missouri and the other of Oregon. The notes were held by

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the respondent in Missouri at the time they matured. The appellant has presented a forceful argument, supported by many authorities, to the effect that a cause of action accrued or arose in the state of Missouri at the maturity of each note; and he also argues, under the Missouri statutes which are pleaded and proved, that the last three notes are barred because the appellant was a nonresident of that state at the time of the maturity of these notes. If the causes of action based upon the last three notes arose in Missouri and are barred by the statutes of that state, then, by the terms of our statute above quoted, no action shall be maintained thereon. We think we may concede, for the purposes of this case, that the causes of action arose or accrued in the state of Missouri, as argued by the appellant. The question then is, are they barred by the Missouri statutes? The Missouri statutes provide, at §§ 6773 and 6774, Revised Statutes of Missouri, 1889, that an action upon any writing for the payment of money shall be commenced within ten years. Section 6781 of the same statute provides:

“If at any time when any cause of action herein specified accrues against any person who is a resident of this state, and he is absent therefrom, such action may be commenced within the times herein respectively limited, after the return of such person into the state; and if, after such cause of action shall have accrued, such person depart from and reside out of this state, the time of his absence shall not be deemed or taken as any part of the time limited for the commencement of such action.”

See, also, § 1897, Revised Statutes of Missouri, 1909.

It is claimed by the appellant that this statute has been construed by the Missouri courts to mean that there is no suspension of the statute in cases where the defendant is a nonresident when the cause of action accrued, citing *Thomas v. Black*, 22 Mo. 330, and subsequent cases. These cases do hold to the construction stated, but they all arose where the defendants were actual nonresidents of Missouri when the contracts sued upon were entered into, and when the right to sue

arose. The cases were clearly within the statute. In the case cited, the court said:

“This case is obviously within the body of the statute. The action accrued in January, 1840, and suit was not brought until October, 1854, more than fourteen years after the cause of action accrued. Now is it within the exception made in the 7th section above quoted? We think that it is not. The person mentioned, as against whom the cause of action accrues in that section, must, at the time it accrues, be a resident of this state. Then, if he, though a resident of this state, be out of it when the action accrues, the action may be brought within the time limited, after the return of such person into the state. The person must be a resident of this state when the action accrues. Here the defendant was a nonresident; he was living in Kentucky, and there continued to live until long after the cause of action accrued. He is not such a defendant as the seventh section was designed to embrace; nor is he embraced by its provisions.”

No case has been cited to us from that state where it has been held that the action is barred when the parties were residents at the time the note was made, and when, before the note became due, the maker left the state and remained away. If the defendant was a resident of Missouri when the action accrued, the statute did not run against the notes for the reasons stated in that case. Upon the question of the residence of the defendant, the trial court in this case found as follows:

“That about the latter part of 1897, and a short time before the note set forth in the second cause of action fell due, defendant G. W. Gates absented and removed himself from the state of Missouri, and for several years thereafter was unstable and shifting in his whereabouts, having no permanent residence, and his address and whereabouts were unknown to the plaintiff, and at no time thereafter did the defendant return to or resume his residence in the state of Missouri so that service of process could be made on him therein. According to defendant's statements and his best recollection, he was in Havana, Cuba, in February, 1898; Ft. Worth, Texas, in August 1898; and in Pittsburgh, Penn-

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sylvania, in February, 1899. In the fall of 1900 he was also in Pittsburgh. That said G. W. Gates now is and was at the time of the institution of this suit a resident of the state of Oregon, but the evidence wholly fails to show when he became a resident thereof; that neither the plaintiff nor the defendant herein have ever at any time been residents of the state of Washington."

These findings are in accord with the evidence. They do not show that the defendant was a nonresident of the state of Missouri at the time the action accrued. He was simply absent from that state at that time, apparently roving about with no other fixed abode. If defendant was a nonresident at that time, it devolved upon him to show that fact, and failing to do so, the presumption is that he continued to be a resident of Missouri and was temporarily absent therefrom, at least until he established a residence elsewhere. This brings the case within the first clause of the statute, and under the decision above cited, the statute has not yet begun to run against the last three notes. It would seem a strange construction of the Missouri statute to hold that a resident of that state might, in the same transaction, make two notes on the same day, one of which matured in twelve months, and the other in eighteen months, and continue to reside in that state for fifteen months and thereby start the statute running as to the first note; then leave the state with no other fixed abode, and after remaining absent ten years, be heard to say that the first note upon which the statute began to run was not barred, while the other note was barred. We are satisfied that the Missouri statute was intended to cover cases like this. No case is cited to the contrary.

We are satisfied that the action is not barred in Missouri, and it follows that the judgment must be affirmed.

DUNBAR, C. J., FULLERTON, and PARKER, JJ., concur.

GOSE, J. (dissenting)—I think the reasonable inference from the evidence is that the appellant was a nonresident of

the state of Missouri when the cause of action accrued, and that the notes are barred by the statute. I therefore dissent.

[No. 9409. Department One. July 24, 1911.]

GEORGE MILNE, *Appellant*, v. M. FRANCIS KANE *et al.*,
Respondents.¹

HUSBAND AND WIFE—COMMUNITY DEBTS—TORTS OF HUSBAND IN COMMUNITY BUSINESS. The community is liable to a passenger for the tort of the husband in negligently driving an automobile for hire, where the automobile was operated for the benefit of the community.

Appeal from an order of the superior court for King county, Tallman, J., entered September 30, 1910, granting a new trial as to one defendant, after the verdict of a jury rendered in favor of the plaintiff and against both defendants, in an action for personal injuries sustained by a passenger in an automobile through a collision with a street car. Reversed.

Trimble & Swasey, for appellant.

M. Francis Kane, for respondents.

MOUNT, J.—The plaintiff brought this action to recover a judgment against the defendants on account of personal injuries received by him while being carried as a passenger for hire in an automobile. The automobile was operated for the benefit of the community consisting of Mr. Kane and his wife. It was being driven by the defendant M. Francis Kane at a high rate of speed, and ran against a street car and injured the plaintiff. The case was tried to the court and a jury. The jury found a verdict in favor of the plaintiff and against both the defendants, for \$900. The defendants moved for a new trial. This motion was denied as to

¹Reported in 116 Pac. 659.

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Mr. Kane, and a judgment was thereupon entered against him, but was granted as to Mrs. Kane, upon the ground that the community was not liable. The plaintiff has appealed from the order granting a new trial as to Mrs. Kane.

The defendants rely upon the case of *Brotton v. Langert*, 1 Wash. 73, 23 Pac. 688, where it was held that, "community real estate is exempt from execution on a judgment rendered against the husband, who, as constable, wrongfully sold mortgaged personal property, under execution." The logic of that case no doubt supports the contention of the defendants here, but we do not desire to extend that doctrine so that it will cover cases where the community as such is the wrongdoer, as well as to cases where an individual member is a wrongdoer, as was the case there. In the case of *Floding v. Denholm*, 40 Wash. 463, 82 Pac. 738, we held that community property was liable upon a surety obligation entered into by the husband alone for the benefit of the community. We there distinguished the *Brotton* case, by saying that the liability of the husband in that case arose on account of a transaction which was not for the benefit of the community. In that case we said:

"The rule now is that community property is liable for a debt created by the husband for the benefit of the community. But such property is not liable for a debt created by a tort of either spouse, or one which is not for the benefit of the community."

See, also, *McGregor v. Johnson*, 58 Wash. 78, 107 Pac. 1049, 27 L. R. A. (N. S.) 1022.

In this case, if the negligence of the husband causing the injury may be held to be a tort, it was the tort of the community, because the husband was acting for the community. It is clear, we think, that, if the community consisting of the two defendants had employed a man to drive the automobile, and the negligence of this employee had caused the injury, the community would be liable. This would follow because the employee would be the agent of the community,

and for his negligence in the line of his duty the community would be liable. The fact that Mr. Kane was himself the driver, and was negligent, does not change the liability. He was one of the community, acting in the line of the business for the benefit of the community, and was as much an agent for both as an employee doing that work would have been. If the community joined in the tort, the community was liable. We are satisfied, therefore, that the negligence here, though actually committed by the husband, was the negligence of both himself and wife, because it was committed by him as agent of the community, in the line of his duty, in a business in which the community was engaged.

The trial court, therefore, erred in not entering a judgment against both defendants. The case will be remanded for that purpose.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9438. Department One. July 24, 1911.]

CARSTENS PACKING COMPANY, *Respondent*, v. NORTHERN
PACIFIC RAILWAY COMPANY, *Appellant*.¹

CARRIERS—LIVE STOCK—CONTRACT AS TO VALUE—LIMITATION OF LIABILITY—STATUTES—PUBLIC POLICY. Rem. & Bal. Code, § 8648, providing that no contract shall exempt a carrier of live stock from liability that would exist had no contract been entered into, does not invalidate an agreement with the shipper as to the value of the stock and limiting liability to such value; and the same is not void as against public policy when freely and fairly made in consideration of the rate given, a higher valuation being available at a higher rate.

Appeal from a judgment of the superior court for Pierce county, Chapman, J., entered June 28, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for the value of live stock lost while being transported. Reversed.

¹Reported in 116 Pac. 625.

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Geo. T. Reid, J. W. Quick, and L. B. da Ponte, for appellant.

Ellis, Fletcher & Evans, for respondent.

MOUNT, J.—The respondent brought this action to recover the value of certain sheep and hogs, lost through the alleged negligence of the defendant. The alleged value of the sheep and hogs lost was \$821.05. The case was tried to the court and a jury. A verdict was returned in favor of the plaintiff for the sum of \$713.20. Judgment was entered upon the verdict. The defendant appeals.

There is no substantial dispute upon the facts in the case. It appears that, on December 16, 1909, the plaintiff shipped a car load of hogs and a car load of sheep from Stockdale, Oregon, to Tacoma, Washington. The two car loads were delivered at Stockdale to the Spokane, Portland & Seattle Railroad Company, which transported the stock to Vancouver, Washington, and there delivered it to the Northern Pacific Railway Company, to be transported to Tacoma. The stock was delivered to the railway company at Stockdale by one F. M. Lacey, the plaintiff's agent, who at the time of delivery executed a contract, by which it was agreed that the value of each pig was ten dollars and each sheep was three dollars, being the valuation upon which the rate of carriage was based. At the time this contract was entered into, an option was given the shipper to fix a higher valuation upon the stock for which a higher rate was charged, the additional rate being twenty-five per cent added to the rate charged for each 100 per cent or fraction thereof of valuation of the stock over the valuation fixed by the contract entered into.

At the trial of the case, it was conceded that the train upon which the stock was being transported was wrecked by a collision with another train on the defendant's line, between Vancouver and Tacoma, and that 108 of the sheep were killed and lost to the plaintiff, except for a small sum realized

from the carcasses for fertilizer and for certain pelts. It was also conceded that two of the hogs were lost, and that the remaining hogs suffered an excessive shrinkage by reason of the wreck and consequent delay in transit. The total for the hogs amounted to \$32.65. The appellant requested the trial court to instruct the jury, in substance, that the measure of plaintiff's recovery was fixed by the contract, and should not exceed three dollars for each sheep and ten dollars for each hog lost. The court refused to give this instruction, but instructed the jury that the measure of recovery was "the difference between the actual market value of the sheep and hogs so injured, in the condition in which they were delivered to the plaintiff at Tacoma, and the actual value thereof had they been delivered to the plaintiff uninjured except for such injuries as would result from reasonably careful transportation."

The main question in the case is upon the measure of damages. The defendant contends that the measure is fixed by the agreement at three dollars for each sheep and ten dollars for each hog lost; while the plaintiff contends that the damages should be measured by the actual value of the animals at the place of destination, as the court instructed the jury. It is claimed by the plaintiff that § 23 of the railroad commission act, as amended in 1907, makes the contract in question void. The defendant argues (1) that this amendment is void because it is not germane to the title of the act, and (2) that if valid, it has no application to the contract in question. The amendment is as follows:

"This act shall not have the effect to release or waive any right of action by the state or any person for any right, penalty, or forfeiture which may have arisen or may hereafter arise under any law of this state; and all penalties accruing under this act shall be cumulative of each other, and a suit for the recovery of one penalty will not be a bar to recovery of any other. And provided, that no contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting live stock by railway from liability of

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a common carrier, or carrier of live stock, which would exist had no contract, receipt, rule, or regulation been made or entered into." Laws 1907, p. 691, § 1; Rem. & Bal. Code, § 8648.

Before the passage of this amendment, we had, upon different occasions, passed upon the validity of contracts similar to the one now before us, and had sustained them as not being against public policy. *Hill v. Northern Pac. R. Co.*, 33 Wash. 697, 74 Pac. 1054; *Windmiller v. Northern Pac. R. Co.*, 52 Wash. 613, 101 Pac. 225; *Gomm v. Oregon R. & Nav. Co.*, 52 Wash. 685, 101 Pac. 361, 25 L. R. A. (N. S.) 537; *Pierson v. Northern Pac. R. Co.*, 61 Wash. 450, 112 Pac. 509. In the last named case, we said, in reference to a contract like the one in question here:

"If this contract was freely and fairly entered into, it measures the rights and obligations of the parties, under repeated rulings of this and other courts."

It follows, therefore, that, unless the rule has been changed by the statute above quoted, the contract in question measures the extent of the plaintiff's recovery from whatsoever cause. The statute provides:

"That no contract . . . shall exempt any corporation engaged in transporting live stock by railway from liability of a common carrier . . . which would exist had no contract . . . been entered into." Laws 1907, *supra*.

This statute means that the common law liability cannot be avoided by contract. It is the duty of the carrier to safely transport the goods, and in case of loss from negligence or otherwise, the carrier is liable for their value, which duty may not be avoided. But the statute does not say, and we think does not mean to say, that the parties may not agree upon the value of the shipment before it is made. It simply means that the duty of the carrier to safely carry cannot be avoided by contract, and this is the public policy which the statute sought to declare. If the property is lost or injured, the carrier is liable for the injury or value of

the property. But the parties are not, and were not at common law, prohibited from agreeing upon value, either before or after injury or loss has occurred.

In speaking to this question, in *Barnes v. Long Island R. Co.*, 100 N. Y. Supp. 593, the appellate division of the supreme court of New York said:

“Chancellor Kent, who undoubtedly understood the common law, in his Commentaries (2 Kent’s Com. 603), lays down the proposition that: ‘The common carrier is responsible for the loss of a box or parcel of goods, though he be ignorant of the contents, or though those contents be ever so valuable, unless he made a special acceptance. But the rule is subject to a reasonable qualification; and if the owner be guilty of any fraud or imposition in respect to the carrier, as by concealing the value or nature of the article, or deludes him by his own carelessness in treating the parcel as a thing of no value, he cannot hold him liable for the loss of the goods. Such an imposition destroys all just claim of indemnity; for it goes to deprive the carrier of the compensation which he is entitled to, in proportion to the value of the article intrusted to his care and the consequent risk which he incurs, and it tends to lessen the vigilance that the carrier would otherwise bestow.’”

In that case it was held that a contract fixing the value of the shipment, in substance the same as the contract here, did not attempt to avoid liability, but sought to fix the liability at the value which the parties agreed upon as the basis for computing freight charges. In *Greenwald v. Weir*, 115 N. Y. Supp. 311, the court, in discussing the effect of the amendment to § 20 of the interstate commerce act, which provides, the same as our statute, that no contract, etc. shall exempt such common carrier from the liability hereby imposed, held that the amendment to the Federal statute was declaratory of the common law, but created a new liability by making the initial carrier liable for a loss upon the line of a connecting carrier, and said:

“What the statute forbids is the use of any device whereby the carrier undertakes to ‘exempt’ himself from the newly

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imposed liability. The use of the word 'exempt' is appropriate if it was the intention of the Congress to prevent a carrier from relieving himself altogether from liability for a loss occurring on the line of a connecting carrier, but wholly inappropriate if intended to prevent an agreement between the carrier and the shipper as to the value of the goods to be shipped. Both the Federal courts and the courts of this state have uniformly distinguished between shipping contracts wherein the carrier has undertaken to exempt himself from liability at all and those in which he has agreed with the shipper as to the amount which should be taken as the value of the goods. Contracts of the first kind have been generally condemned, and contracts of the second kind sustained. . . . This distinction rests upon a sure and substantial basis. The contract of carriage by a common carrier imposes upon the latter a double obligation—that of carriage proper, and that of insurance. It is reasonable and customary to fix a rate to be paid with reference to both liabilities, and in order to fix such rate it is necessary that the carrier should be apprised of the value of the article to be carried."

See, also, *Greenwald v. Barrett*, 199 N. Y. 170, 92 N. E. 218; *Bernard v. Adams Express Co.*, 205 Mass. 254, 91 N. E. 325, 28 L. R. A. (N. S.) 293; *Larsen v. Oregon Short Line R. Co.* (Utah), 110 Pac. 983.

It is apparent, from the reasoning in these cases, that neither our statute nor the Federal statute undertakes to do more than to prevent contracts which would relieve carriers of their common law duty. The common law did not, and our statute does not, prevent the carrier and the shipper from agreeing upon the value of the goods. Such agreements, when freely and fairly made, are binding. Freight rates are necessarily based upon the character and value of the goods shipped. It is unreasonable to suppose that a carrier, can transport a horse worth \$100,000 for the same price for which it can transport one worth only \$100. The reason is obvious. The more valuable article requires better facilities and more constant care, attention, and expense. If the statute in question means that the shipper and carrier

may not agree upon the value of the article shipped and be bound by that agreement, the result is that no freight rate may be based upon value, but that a level rate must be fixed on all articles of the same kind without reference to the value. This would mean that the shipper of less valuable freight must pay the cost of shipping the more valuable freight. In other words, to arrive at a reasonable rate, a basis must be made upon average value, which would avoid the universally accepted rule for rate making. The statute did not intend such a result. In Iowa in *Hart v. Chicago & N. W. R. Co.*, 69 Iowa 485, 29 N. W. 597; in Nebraska in *Chicago etc. R. Co. v. Witty*, 32 Neb. 275, 49 N. W. 183, 29 Am. St. 436, and in Kansas, in *Kansas City etc. R. Co. v. Simpson*, 30 Kan. 645, 2 Pac. 821, 46 Am. Rep. 104, under statutes similar to ours, it was held that a contract limiting the liability to a certain agreed value was void. But it seems to us that in those cases the courts have overlooked the right of the parties to agree upon a reasonable value of the articles offered for shipment. At any rate, we have adopted a different rule and one which seems to follow the better reasoning and the great weight of authority. In the case of *Carstens Packing Co. v. Southern Pac. Co.*, 58 Wash. 239, 108 Pac. 613, 27 L. R. A. (N. S.) 975, we held that the statute under consideration established the public policy of the state. We were there discussing the effect of a contract which sought to relieve the carrier against liability for negligence, and held to the almost universal rule that the statute controlled in a case of that kind. But in this case, we are of the opinion that the statute has no application and does not prevent an agreement as to value. We therefore conclude that the cases heretofore decided by us are controlling in this case. With this view, it is unnecessary for us to consider the question of the constitutionality of the amendment.

The judgment appealed from is therefore reversed, and the cause remanded with directions to the trial court to enter

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a judgment for the value of the sheep lost, at the price agreed upon, viz., three dollars per head for 108 head, and for \$32.65, being the loss on account of hogs, making a total of \$356.65.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ. concur.

[No. 9479. Department One. July 24, 1911.]

WALTER JAMES, *Respondent*, v. ALEXANDER PEARSON,
Appellant.¹

TRIAL—DISMISSAL ON OPENING STATEMENT—ADMISSIONS—MASTER AND SERVANT—INDEPENDENT CONTRACTOR. In an action for personal injuries to an employee, the opening statement of plaintiff's counsel does not admit that the negligence of a superintendent doing the work on a percentage basis was that of an independent contractor, where it was stated that it would be shown that all the men were paid by the defendant and that the superintendent was only a foreman.

MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR. Upon an issue as to whether one to whom was sublet the putting up of the structural iron work in a building was a foreman or an independent contractor, the defendant's power of control governs; and a finding that he was a foreman is warranted, where it appears that defendant was to pay the men and furnished the appliances, and would have suffered any loss in case the work cost over eight dollars per ton, and that the defendant was to pay such person for superintendence on a percentage basis, viz., the difference between the actual cost of the work and eight dollars per ton in case the cost was less than that sum.

SAME—TRIAL—INSTRUCTIONS. Upon an issue as to whether negligence causing injury to an employee was that of a foreman or of an independent contractor, an instruction submitting the issue as to who employed and paid the men and had control of the work, is not erroneous as not properly defining an independent contractor, where another instruction properly defined an independent contractor.

Appeal from a judgment of the superior court for King county, Albertson, J., entered December 2, 1910, upon the

¹Reported in 116 Pac. 852.

verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee engaged in the construction of a building. Affirmed.

Arthur C. Dresbach, for appellant.

Owens & Finck and *Reynolds, Ballinger & Hutson*, for respondent.

MOUNT, J.—The plaintiff brought this action to recover for personal injuries, resulting to him by reason of the breaking of a defective rope which was used on a derrick for the purpose of hoisting structural iron upon a building which was being constructed. Plaintiff recovered a judgment in the court below. The defendant appeals.

The principal defense interposed was that the plaintiff was employed by one Norman, who was an independent contractor, and the defendant was, therefore, not liable for his negligence. It appears that the defendant was the general contractor for the construction of the building, and had authority to sublet certain portions of the work. He claimed that he sublet a contract to one H. Norman, to place certain structural iron in the building at the agreed price of eight dollars per ton, and that he had no control over Mr. Norman or over the men whom Mr. Norman employed to do the work. The plaintiff, on the other hand, claimed that Norman was merely foreman, employed by the defendant upon the work, and that his pay was fixed by agreement at the difference between the cost of doing the work and eight dollars per ton; that the defendant furnished certain tools and appliances and paid the men for the work and had general control over the men and the work. Mr. Norman testified in reference to these facts as follows:

“A. Well, in securing the work from Mr. Pearson he told me he had a man previous, that he paid him six dollars a day and he walked around with his good clothes on and he had not done any work, and he employed a man under him who managed the men.. And he would not give me that kind

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of a lay out; and I was to work on a percentage basis, or a kind of a contract, and I would guarantee that the work would not cost Mr. Pearson only a certain price per ton. Q. Was the work done under Mr. Pearson's supervision? A. Mr. Pearson was not on the job. Q. I mean the superintendent under him. A. I stated Mr. Pearson's superintendent instructed me where to start at and where to quit and when to quit, and if he wanted any extra work done he would instruct me where to do it and when to do it; but so far as directing the men, he would always come to me. . . . Q. Whose derrick was used in the lifting of this iron? A. That must have been Mr. Pearson's derrick. It was on the building floor up there. Q. It was there when you went there? A. Yes, sir. . . . Q. Whose rope was it that broke? . . . State whose rope it was. A. It must have been Mr. Pearson's rope. It was in the warehouse there and I and one man went down and got the rope and placed it on the derrick. Q. Got it out of Mr. Pearson's warehouse? A. Yes, sir; out of his tool house. . . . Q. You had several men— A. I employed the men and I told them who would pay them and where they would get their money. Q. What did you tell them about that? A. I told them that Mr. Pearson would pay it. Q. Was that in your agreement that Mr. Pearson was to pay the men? A. Yes, sir. . . . Q. Suppose that there was a loss would have occurred there, who would have borne that loss? A. The general contractor, Mr. Pearson himself. . . . If I exceeded that contract price, that is, if I exceeded the amount in labor of the 187 or whatever tonnage it was at eight dollars a ton, if I did not go ahead and furnish the funds to complete this work, I would simply quit and Mr. Pearson would finish and I would receive nothing for what time I would have labored; that would be the outcome of the whole thing."

Mr. Pearson denied this, and testified, in substance, that Mr. Norman was an independent contractor.

The appellant argues that the court should have dismissed the action upon defendant's motion upon the opening statement of counsel, for the reason that such statement conceded that Mr. Norman was an independent contractor and liable for the damages; and also upon defendant's motion made at the close of the evidence, for the reason that the proof

showed that Mr. Norman was an independent contractor. We think the court did not err in denying these motions. While counsel for plaintiff stated in opening his case that the defendant "made an agreement with Mr. Norman that, instead of paying him six dollars a day as he had paid Mr. Sandusky, that he would pay him so much per ton in accordance with the number of tons of structural iron so put up, and so Mr. Norman agreed to that;" he also stated: "We will show . . . that all the men were paid by Mr. Pearson, and that Mr. Norman acted as foreman, and that the contract with reference to payment was merely the manner of paying him; paying him in accordance with the amount of work he should do instead of paying him so much per day." It is, therefore, clear that it was not admitted that Mr. Norman was an independent contractor. The contrary was claimed.

It is also plain from the testimony of Mr. Norman set out above that the question of fact, whether he was an independent contractor, was very seriously disputed. Counsel for appellant cites *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904, and *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283, to the effect that the test which determines the relation of independent contractor is the right to exercise the power of control. There was clearly enough in this case to meet that test, and to show the complete right of the defendant to control the manner and methods of doing the work and of employing, discharging, and paying the men.

The trial court gave the following instruction:

"In passing upon the question of whether he was an independent contractor the question to be determined in this case is whether the men retained by Mr. Norman for this job were in this employ or in the employ of the defendant. If you find from the evidence that Mr. Norman was to get so much per thousand feet of iron installed by him on the floors of this building under the agreement between him and

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Mr. Pearson, but that it was provided under the agreement that the men employed to do this work should be paid by the defendant out of the money which would otherwise become due to Mr. Norman upon completion of the work, then the plaintiff in this case was an employee of the defendant and not of Mr. Norman. In order that you may understand more clearly, I say, if you find from the evidence that Mr. Pearson said to Mr. Norman, 'You go ahead and do this work, get the men necessary for the purpose, let me know the amount of wages of those men and I will pay it and I will deduct it out of what is coming to you at the end of the job, under the agreement to pay you so much per thousand pounds of iron,' if you find that to be the fact from the evidence, then you would find that Mr. Norman was not an independent contractor, but a foreman for whose negligence the defendant would be responsible. I think I will submit the case to you, gentlemen, upon that one question of fact, under evidence before you. If you find under all of the evidence in this case that it was the agreement between Pearson and Norman that Mr. Norman was to get these men but they were to be paid by Mr. Pearson out of what would be coming to Mr. Norman on the completion of his job, then, if Mr. Norman was negligent in the matter of supplying these guy ropes, Mr. Pearson was negligent and if your verdict would be against Norman—if your verdict in any event could have been against Norman, your verdict would be against Pearson in this case. Unless you find from the evidence that it was the agreement between Norman and Pearson that Pearson was to pay the men employed by Norman in the prosecution of this work out of the money that would be due to Norman upon the completion of the work, then your verdict must be for the defendant. As I regard the case under the evidence and the law, it is necessary for you to determine that one question of fact and your verdict will be for plaintiff or defendant as you determine it, provided a recovery is not precluded by some of the other defenses invoked."

Appellant argues that this instruction is erroneous, for the reason that it does not properly define an independent contractor. It clearly does not, when taken alone. The

court, however, had already instructed the jury upon that subject, as follows:

“If you find from the evidence, gentlemen, that under the agreement between Pearson and Norman the apparatus necessary for use in the installment of this iron was to be furnished by Norman and the work and labor in connection therewith was to be furnished by Mr. Norman, that Mr. Norman had control and direction over the men at work on the job through his employment, and that the only connection of the defendant with the matter was the right to inspect and see whether the work was being done in accordance with the plans and specifications of the building, in such event, Mr. Norman would be an independent contractor for whose negligence the defendant could not be held responsible. And if you find such a situation from the evidence with regard to the relation between Mr. Norman and Mr. Pearson, your verdict would be for the defendant.”

The court then, after referring to the fact that there was a dispute in the evidence as to who employed and paid the men, and who had control of the work, and that this was the question to be determined, gave the instruction complained of. The purpose of the instruction was not to define an independent contractor, for that had already been done; but was to submit to the jury the question, who employed and controlled the men, and who was responsible for their pay; for that was the main question in dispute in the case. We are of the opinion that the instructions, when read as a whole, do not misstate the law.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

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[No. 9418. Department Two. July 24, 1911.]

P. PONELLI, *Respondent*, v. SEATTLE STEEL COMPANY,
Appellant.¹

MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPALS. Common laborers in a steel plant instructed to cool out the neck of a furnace and remove slag, are fellow servants, and one of them does not become a vice principal by reason of his greater experience, or of his taking the initiative and directing his fellow workman to "make room," whereby the fellow workman was put in a place of danger.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DETAILS OF WORK. Permitting the escape of water in cooling the neck of a furnace is not an act of negligence upon the part of the master, where the men themselves were responsible for the condition.

MASTER AND SERVANT—NEGLIGENCE OF MASTER—DUTY TO WARN—ACTS NOT ANTICIPATED—SCOPE OF ORDER. Where a common laborer, instructed to cool out the neck of a furnace and remove slag, caused an explosion by breaking a block of slag and allowing its molten contents to come into contact with water, he cannot claim that he should have been warned as to the liability of such an explosion, the breaking of the block of slag being no part of his duty and an act that would not be anticipated by the master.

Appeal from a judgment of the superior court for King county, Gay, J., entered May 25, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a steel plant. Reversed.

Kerr & McCord, for appellant.

Joseph M. Glasgow, for respondent.

MORRIS, J.—Respondent, while in the employ of appellant, was injured, and this appeal is taken from a judgment awarding him damages for such injury. The determinative facts are these: On the morning of November 15, 1909, respondent, who was a common laborer performing general

¹Reported in 116 Pac. 864.

work around the steel plant, was instructed by his foreman, in connection with two other employees, Wagner and Gentelee, to cool out the neck of a furnace and remove the slag therefrom. There were a number of furnaces in appellant's plant, from which when in use it was necessary to draw off the slag. This was drawn off while in a molten state, into a cinder buggy, having a receptacle twelve inches wide at the bottom, fifteen inches wide at the top, and twelve inches deep. The slag is allowed to remain in this buggy until it is cool enough to dump, when it is dumped upon the earthen floor of the furnace room, forming a solid block the size of the receptacle and weighing from 150 to 250 pounds, depending upon the amount of iron in it. These blocks of slag remain where they are dumped until, in the judgment of the men whose work it is to remove them, they are cool enough to handle, when they are thrown into a small car and taken away.

In carrying out their instructions, respondent and his two companions went to the furnace to which they were directed, where Wagner poured water into the neck to cool the slag so it could be handled, while Gentelee and respondent took down the brick side so as to enable them to get at the slag when it was sufficiently cooled. Gentelee and respondent took out the brick, throwing them behind them, until they came to the last row, when Gentelee told respondent to make room. Respondent then took the brick and commenced piling them around the bottom of the furnace, when he noticed a block of slag which was located by different witnesses from three to nine feet from the neck of the furnace. In cooling out the neck of the furnace with water, some escaped and ran down upon the ground and under this block of slag. Respondent picked up a crowbar and struck the slag, breaking it, and its molten center coming in contact with the water underneath caused an explosion, injuring respondent. The appellant had two men, Page and Anderson, whose work was to carry away the slag, and they were thus

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working at the time. Page says he knew when the slag could be safely broken, and had been warned of the danger of explosion in permitting the molten slag to come in contact with water, and that when he saw what respondent was about to do, he warned him against it. Respondent says he heard no warning from Page, and did not know of the danger of an explosion in breaking the block of slag before its center had cooled. The negligence pleaded was in allowing the water used in cooling the furnace to escape and run over the floor and underneath the slag; and in failing to warn respondent of the danger of explosion from the contact of water and hot slag, and in commanding him to remove the slag. These facts and contentions of negligence present the legal questions as to the relation between respondent and Gentelee, the duty of respondent, and the necessity for warning.

We cannot conceive upon what theory Gentelee and respondent can be classed as other than fellow servants. The mere fact that Gentelee took the lead in directing the work would not make him a vice principal. When several servants are engaged in a common task, some one of them, by reason of age, experience, character, or common consent, generally takes the initiative in directing the detail of the work. This does not change the relation from fellow servant to vice principal. It is the duty of the master to provide a reasonably safe place in which his servants may perform their work, and to further provide them with reasonably safe appliances and instrumentalities with which to perform that work. When that is done, his duty is at an end, and the detail of the work may be left to the servants themselves. Where the master takes a servant and, for the time being, intrusts to him the duty of contributing to the safety of the place, as in *Sroufe v. Moran Bros.*, 28 Wash. 381, 68 Pac. 896, 92 Am. St. 847, 58 L. R. A. 313, and like cases, the servant, while in the performance of that act, became a vice principal. We have no facts here to bring Gentelee within this rule,

assuming for the sake of argument that it was in following his suggestion to "make room" that respondent was placed in a position of danger. Such a suggestion would not make of him a vice principal, nor distinguish this case in this respect from the rule announced in *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034; *Mercer v. Lloyd Transfer Co.*, 59 Wash. 560, 110 Pac. 389; *Cavelin v. Stone & Webster Engineering Co.*, 61 Wash. 375, 112 Pac. 349, and *Swanson v. Gordon*, ante, p. 27, 116 Pac. 470. To hold that every time one servant suggests a plan for doing the work, or calls upon another servant to do something which in his judgment will facilitate the work, in making the suggestion or in directing the other servant, he becomes a vice principal and fixes a liability upon the master for any injury incurred in following the suggestion, or in accepting the direction where the duty of superintendence had not been intrusted to him by the master, would be to go further than any case with which we are familiar, and announce a new rule with no legal principle for its support.

An additional reason for holding that the direction of Gentelee to "make room" cannot be attributed to the appellant for the purpose of establishing a liability for this injury, is that such a direction did not include, nor was it intended to include, a direction to respondent to break up and remove the block of slag, which was the proximate cause of the injury. Gentelee knew that Page and Anderson were there for that purpose, and had he wanted the slag removed he says he would have called upon those men to remove it. His direction to respondent called only, and was intended to call only, for the removal of the brick taken from the neck, and to pile it up in such a manner that it would no longer be in the way. Neither can we say that permitting the escaping of the water from the neck of the furnace was of itself such an act of negligence as to fasten liability upon ap-

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pellant. The men themselves were responsible for this condition. Neither does the record disclose any way in which it could have been prevented.

The last assertion of negligence is in the failure to warn. The doctrine of needful warning or instruction does not apply to this situation. It extends only to those appliances and instrumentalities made use of by the servant in his work, or to such hidden dangers as he is subjected to in his work, and to such as can be reasonably anticipated by the master. *Nordstrom v. Spokane & Inland Empire R. Co.*, 55 Wash. 521, 104 Pac. 809, 25 L. R. A. (N. S.) 364. Had there been any hidden danger in taking down the neck of the furnace, or in cooling it with water, or in afterwards taking out the slag, which was the work respondent was sent to do, it would have been the duty of the appellant to give warning of such danger, that it might be avoided. Or had the breaking of the blocks of slag been a necessary part of his work, such duty might have been extended to include a warning of its danger. But the breaking of these blocks of slag had nothing to do with cleaning out the furnace. There was no connection between the two acts. Neither could the appellant anticipate that respondent would attempt to break these blocks while engaged in cleaning out the furnace, knowing it had provided competent men with full knowledge of the danger, who were there to do that very thing. Respondent was, therefore, injured in doing an act he was not called upon to do, and which was no part of the work he was sent to perform. The presence of the block of slag near where respondent was working did not make the place unsafe, as there was no danger to respondent from the block itself. It was only his unnecessary and uncalled for act that produced the danger. Had he undertaken that only which he was directed to do, no danger would have befallen him, either from the act itself or the place provided for its performance.

Respondent relies upon a number of cases, including *Northport Smelting & Refining Co. v. Twitchell*, 156 Fed. 648, where injury had occurred because of a lack of knowledge that molten iron or slag will explode when brought in contact with water, rust, ice, or dampness. But in all those cases, as in the *Northport* case, the injury was to the employee who was necessarily handling the hot mass without knowledge of its dangerous tendency, and would be authoritative here had this injury occurred had respondent been sent by appellant to break up or remove this slag without warning of the latent danger. In those cases the master might have anticipated the act which produced the injury, as a necessary part of the directed work. In this case there was no reason for the master to anticipate that respondent would attempt to break up and remove the slag.

We cannot find any act of appellant upon which negligence can be predicated which resulted in the injury complained of; and lamentable as is the condition of respondent, no liability can be fixed upon appellant unless its negligence is shown to be the proximate cause of his injury.

The appellant moved for a directed verdict at the conclusion of the evidence, which was denied. It follows from what we have said, it should have been granted. The judgment is reversed, and the cause remanded with instructions to dismiss.

CHADWICK, CROW, ELLIS, and GOSE, JJ., concur.

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[No. 9179. Department Two. July 24, 1911.]

CITIZENS SAVINGS BANK, *Appellant*, v. C. T. HOUTCHENS
*et al., Respondents.*¹

BILLS AND NOTES—ACTIONS—PLEADING—DEFENSES—WAIVER—INCONSISTENCY. The denial of an allegation that plaintiff was the owner and holder of a note for value before maturity and in due course, is not waived by or inconsistent with an affirmative defense alleging want of consideration and fraud in the inception of the note, and that plaintiff had actual notice of the infirmity, "at the time it became the owner and holder of such note as in the complaint alleged;" since the admission that the plaintiff is the owner and holder of the note does not admit that it was the holder in due course for value, in good faith, before maturity.

BILLS AND NOTES—ACTIONS—TITLE—BONA FIDE PURCHASER—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY. Where it was shown by defendants that a promissory note, given in part payment of a stallion, was tainted with fraud in the hands of the original payees, who were dealers in horses, the stallion having been returned because of false representations, in a suit on the note by a bank as endorsee, the burden of showing that it was a holder in due course for value before maturity, within Rem. & Bal. Code, § 3450, is not sustained so as to entitle plaintiff to a directed verdict, where the only evidence of the bank's alleged ownership other than possession and a blank endorsement was that of its cashier, an interested witness, who testified that he had known the payees for years, and the character of their business, that he purchased the note before maturity with twenty-five others of like character, and had previously purchased others in which litigation had arisen, that he expected the original payees to protect the bank on this note for expenses of litigation, although there was no written agreement to that effect, and that none of the makers were known to the bank or their solvency investigated; in view of the fact that his credibility was for the jury, that he carefully refrained from giving any of the attending circumstances, and that no other witnesses to the transaction, or books or records were produced.

Appeal from a judgment of the superior court for Stevens county, Carey, J., entered March 23, 1910, upon the verdict of a jury rendered in favor of the defendants, in an action on a promissory note. Affirmed.

¹Reported in 116 Pac. 866.

Anderson & Stull, for appellant.

Jesseph & Grinstead, for respondents.

CROW, J.—Action by The Citizens Savings Bank, a corporation of Columbus, Ohio, against C. T. Houtchens, J. E. Seale, S. W. Champ, S. H. Bryan, M. W. Teeple, W. L. Pike, H. M. Jaggers, O. P. M. Simcoke, James Crawford, and A. G. Smith, on a promissory note claimed to have been purchased from McLaughlin Brothers, payees, for value, before maturity and in due course. The defendants answered with denials, and pleaded three affirmative defenses by which, in substance, they contended the note was without consideration, had been fraudulently obtained, had not been delivered to the payees, had not been signed by the defendant Houtchens or by any other person authorized to sign for him, and that the plaintiff had obtained the note with notice and knowledge of infirmity in the instrument and defect in the title of the payees who negotiated it. A verdict was returned for defendants. The plaintiff has appealed from the final judgment entered thereon.

Respondents are citizens of Stevens county, in this state. The note is for \$1,400, dated September 9, 1905, due September 1, 1907, bears interest from date, and is payable to the order of McLaughlin Brothers at Colville, Washington. Respondents' evidence shows that one Olmstead, representing McLaughlin Brothers, whose headquarters were in Columbus, Ohio, and Kansas City, Missouri, made a proposition to sell to respondents a stallion then in his possession, which he represented and warranted to be a first-class imported Percheron horse, sound in every respect; that his representations were false and fraudulent; that they were relied upon by respondents; that in compliance with Olmstead's insistence and demand, a corporation to own the horse was to be organized by respondents under Olmstead's direction and supervision; that he fraudulently procured possession of the note without its being delivered; that he immediately left Colville, taking

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the note with him; that he has not been there since; that the corporation was never formed; that the horse, not being as warranted, was tendered to McLaughlin Brothers and a return of the notes demanded; that later two other notes each of like amount, fraudulently procured from respondents, were returned to them; that the horse was returned to McLaughlin Brothers through another agent; and that the note now in suit was never returned to the makers. The facts showing the alleged fraud of Olmstead, the nondelivery of the note, and the want of consideration, are more fully stated in the pleadings and briefs, but need not be here recited in detail. Sufficient evidence was introduced by respondents to sustain their affirmative defenses. Appellant made no attempt whatever to controvert or rebut any of this evidence, but in its brief says:

“The respondents, though denying the allegations of the complaint, have utterly failed to substantiate such denial by evidence, but confine their proof to the support of their affirmative defenses. As to these defenses, aside from the allegations contained therein imputing knowledge of defect in title to the appellant, they appear to have a preponderance of evidence, that is to say, evidence as to the alleged fraud between the original parties to the note in suit; but they fail to support the further allegations contained in said affirmative defenses, to wit, the allegations that appellant had knowledge of the facts and circumstances constituting said alleged fraud.”

The vital question on this appeal is whether, under §§ 3443 and 3450, Rem. & Bal. Code, appellant has been shown to be a *bona fide* holder for value, before maturity and in due course, the title of the original payees having been defective, under § 3446, Rem. & Bal. Code. It is, however, first contended that the trial court erred in denying appellant's motion to strike the three affirmative defenses. Appellant alleged its incorporation under the laws of Ohio, that McLaughlin Brothers had indorsed the note in blank, and that appellant is now the owner and holder thereof. These

allegations were denied. In pleading their affirmative defenses respondents, however, alleged:

"And the *said plaintiff corporation*, its officers, agents and employees, had actual knowledge of all of said false and fraudulent statements, representations and pretensions at the time it became *the owner and holder of said note as in the complaint alleged.*"

Appellant's contention seems to be that this affirmative allegation is inconsistent with the previous denials of the answer, in that it in effect admits, (1) appellant's incorporation, and (2) that appellant is owner and holder of the note. Assuming, without deciding, the effect to be as contended, appellant would not, by reason of such alleged inconsistency, be entitled to an order striking the affirmative defenses of fraud, failure of consideration, and nondelivery, even though it might possibly be relieved from the necessity of introducing evidence to prove its incorporation. Appellant, as indorsee, might hold and own the note, but if it was not as such indorsee a holder in due course, for value, before maturity in good faith, and without notice of any infirmity in the instrument or defect in the title of the payees who negotiated it, appellant would own and hold it subject to the affirmative defenses pleaded, such defenses being sustained by competent proof. The motion was properly denied.

By its remaining assignments, appellant, in effect, contends that the trial court erred in denying its motions for a directed verdict, and for judgment *non obstante veredicto*. Its entire contention on this proposition seems to be that it has shown ownership in due course, for value, before maturity, without notice or knowledge. The only evidence of an assignment to appellant or its alleged ownership or want of notice was given by Frank R. Shinn, its cashier. No corroboration of his testimony, other than possession of the note and a blank indorsement of the payees thereon, appears in the record. No books, records, or documents of the bank, disclosing the transaction or showing payment of value, were

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produced. Shinn testified he had known the payees and the character of their business for many years; that he purchased this note with twenty-five others on August 15, 1907, shortly prior to its maturity; that he forwarded it to Colville, for collection, where it was protested for nonpayment; that he had previously purchased numerous notes from McLaughlin Brothers; that litigation had arisen on a number of them; that he expected McLaughlin Brothers to protect the bank; and that they would protect it on this note for expenses of this litigation, although he had no written agreement to that effect other than the indorsement. No other officer or employee of the bank testified. McLaughlin Brothers and Olmstead, their agent, failed to appear as witnesses, and their absence was not explained. There was no evidence that Shinn or the bank knew any of the respondents, or made any investigation as to their solvency. Yet almost immediately after making the purchase, appellant forwarded the note to Colville for collection, and shortly thereafter instituted suit in this jurisdiction against the makers, although McLaughlin Brothers then maintained headquarters in the city of Columbus, and were to protect the note as indorsers.

These circumstances would seem to indicate a singular anxiety on the part of the bank to invest in lawsuits rather than in first-class negotiable securities. The evidence of this cashier, although undisputed by oral testimony of any other witness, is that of an interested witness. Absence of what he carefully refrains from telling, to say nothing of his affirmative statements, considered in the light of his interest and the attending circumstances, detracts materially from the convincing force of his evidence, the credibility of which was for the jury. Whether appellant was a holder in due course was to be determined by them. The burden imposed upon respondents was to sustain the allegations of their affirmative defenses. This they evidently did to the satisfaction of the jury. Having done so, it at once became apparent that the original payees' title to the note was de-

fective. Section 3446, *supra*. Under § 3450, *supra*, the burden then devolved upon appellant to prove that it or some person under whom it claims acquired the title as holder in due course. If the jury in weighing the evidence discredited Shinn, an interested witness, which they were entitled to do, and doubtless did, appellant failed in its proof. *Keene v. Behan*, 40 Wash. 505, 82 Pac. 884; *Gosline v. Dryfoos*, 45 Wash. 396, 88 Pac. 634; *Ireland v. Scharpenberg*, 54 Wash. 558, 103 Pac. 801. Appellant's only attempt to sustain the burden imposed upon it was by means of the unsupported testimony of Shinn, an interested witness. His credibility was for the jury, and they refused to believe him. Appellant therefore failed in its attempt to show it was a holder in due course, after respondents by their evidence had shown the original payees' title was defective.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

[No. 9206. Department Two. July 24, 1911.]

LOUIS MULLERLEILE *et al.*, Respondents, v. GUSTAVE BRANDT *et al.*, Appellants.¹

ACTIONS—JOINDER OF CAUSES—ARISING OUT OF SAME TRANSACTION. Causes of action to recover the sum paid for a horse, on breach of a warranty that it was gentle, and for damages received in a runaway while attempting to drive it, may be united, as they both arise out of the same transaction, the breach of warranty.

SALES — BREACH OF WARRANTY — DAMAGES — MEASURE. Upon breach of a warranty that a horse was a gentle family driving horse, damages for personal injuries sustained in a runaway while attempting to drive it may be recovered on showing the breach and damages, without any proof of the value of the horse.

SALES—BREACH OF WARRANTY—DEFENSES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—QUESTION FOR JURY. Where a horse, sold March 20, 1909, was warranted gentle, and was in the purchaser's

¹Reported in 116 Pac. 868.

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possession until June 10 when it ran away, in an action for breach of the warranty, in which there was evidence that the plaintiff had notice that the horse was high spirited, that plaintiff was an unskillful driver and negligent, and had ample opportunity of learning the character and habits of the horse, it is error to refuse to instruct the jury that the plaintiff could not recover for personal injuries sustained in the runaway, if guilty of contributory negligence in driving which in whole or in part caused the runaway and accident; whether sufficient time had elapsed to acquaint the plaintiff with the true character of the horse, and the contributory negligence, being questions for the jury.

Appeal from a judgment of the superior court for Chelan county, Grimshaw, J., entered April 26, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for breach of warranty. Reversed.

Reeves & Reeves, for appellants.

John E. Porter and *Porter & Thomason*, for respondents.

CROW, J.—Action for damages by Louis Mullerleile and Gena Mullerleile, husband and wife, against Gustave Brandt and Elizabeth Brandt, husband and wife. Plaintiffs, in substance, alleged they purchased a horse from defendants, which defendants warranted to be a gentle, family driving horse; that when the plaintiff Gena Mullerleile was driving the horse, it ran away and damaged a buggy to which it was harnessed; that plaintiffs relied on defendants' warranty, as they well knew; that plaintiffs paid \$150 for the horse; that it was a vicious, dangerous, and worthless animal, and that by reason thereof plaintiffs were damaged in the sum of \$150. For a second cause of action plaintiffs alleged the purchase and warranty; that the horse was a vicious and dangerous animal; that it had been in the habit of running away; that the respondent Gena Mullerleile, when driving the horse, was thrown from the buggy and personally injured, to plaintiffs' damage in the sum of \$275, and that plaintiffs' buggy was also damaged in the sum of \$75. A verdict was returned for \$275, upon which judgment was entered. The defendants have appealed.

Appellants contend the trial court erred in overruling their demurrer to the complaint, their grounds being that the two causes of action were improperly joined, and that facts sufficient to constitute a cause of action were not stated. The causes of action separately pleaded grew out of the same transaction, the breach of the warranty, and affect all the parties. The complaint certainly stated facts sufficient to show damages sustained. In *Bruce v. Fiss, Doer & Carroll Horse Co.*, 26 Misc. Rep. 472, 56 N. Y. Supp. 234, the syllabus reads as follows:

“Where a horse purchased under a warranty that he was gentle and suitable to drive in a light wagon runs away while being so driven, breaking the wagon, and injuring the buyer, the warrantor is liable for the loss of the wagon and the buyer’s injuries, though the warranty was not fraudulently made.”

The demurrer was properly overruled.

Appellants further contend the trial court erred in denying their motion for a nonsuit and directed verdict. They argue that the respondents cannot recover damages for personal injuries predicated on the alleged breach of warranty. On the trial no competent evidence as to the value of the horse or the extent of the damage to the buggy was introduced, and under the instructions given by the trial judge, the jury awarded damages for personal injuries only. The evidence, however, was sufficient to show the warranty, the dangerous character of the animal, that it ran away, and that Mrs. Mullerleile was thereby injured. If the animal was sold and warranted as a gentle driving horse, it must have been within the contemplation of the parties that it was to be so used. In *Bruce v. Fiss, Doer & Carroll Horse Co.*, 47 App. Div. 273, 62 N. Y. Supp. 96, an appeal of the case above cited, it appeared that defendant sold plaintiff a horse which was warranted to be sound, true, gentle, kind in harness, and suitable to be driven in the practice of plaintiff’s profession as a physician. The horse was in fact vicious,

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and injured plaintiff who sued for damages thereby sustained. The court, holding that damages for personal injuries could be recovered, said:

"In general, the measure of damages in an action for breach of warranty is 'the difference between the value which the thing sold would have had at the time of the sale, if it had been sound, or corresponding to the warranty, and its actual value with the defect.' 2 Sedg. Meas. Dam. § 762. But 'where an article is warranted fit for a particular purpose, the purchaser can recover the damages caused by an attempt to use it for that purpose.' Id. § 766. As to what special or consequential damages can be recovered in case of breaches of warranties of the latter class, the authorities are at variance. In England the cases go very far in allowing indemnity to a purchaser for any injury that may have resulted from a failure to make the warranty good."

After citing and commenting upon a number of cases, the court further said:

"The evidence in this case was sufficient to warrant the jury in finding that the horse was sold to the plaintiff, not only with the warranty that he was sound, kind, and gentle in harness, but also that he was suitable for the plaintiff to drive as a carriage horse. We think one of the most natural and probable results of a breach of this warranty and from the viciousness of the horse would be injury to the vehicle and its occupants. Unless a distinction can be drawn between a warranty on the sale of a horse and that in case of the sale of any other article, we cannot see why the defendant is not liable under the authorities cited."

The motions for a nonsuit and directed verdict were properly denied.

There was evidence, that the respondents purchased the horse on March 20, 1909; that the runaway did not occur until June 10, 1909; that respondents in the meantime had the horse in their exclusive possession and control; that Mrs. Mullerleile had driven it twice; that the appellants had notified respondents the horse was high-spirited; that Mrs. Mullerleile was a careless and unskillful driver; and that the respondents had ample opportunity for learning the character

of the horse prior to the accident. Appellants, in their answer, alleged that respondents were acquainted with the character and habits of the horse prior to the purchase, and that if Mrs. Mullerleile was injured, in the manner alleged or in any other manner, such injury was due to the careless and negligent manner in which she was driving. Appellants requested, but the court refused, an instruction to the effect that, if Mrs. Mullerleile was guilty of contributory negligence in driving carelessly, which in whole or in part caused the runaway and accident, then the respondents cannot recover. This instruction, or one to the same effect, should have been given. Although appellants would ordinarily be liable for damages resulting from the breach of their warranty, some duty devolved upon respondents. They could not keep and use the horse for an indefinite length of time, and in the event of the occurrence of an accident, alleged to have resulted from his vicious character, maintain an action against the appellants for personal injuries thereby sustained. Sufficient time might elapse before an accident to preclude the buyers from maintaining any action at all. On the evidence before us, however, we are of the opinion that the questions whether such a time had elapsed, whether respondents should have known the true character of the horse, and whether they were guilty of carelessness and contributory negligence, were for the jury, and should have been submitted to them by proper instructions. The refusal to give the instruction requested constituted prejudicial error.

The judgment is reversed, and the cause remanded for a new trial.

DUNBAR, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 9240. Department Two. July 24, 1911.]

ADAMS COUNTY MERCANTILE COMPANY, *Respondent*, v.
WALLA WALLA LIVESTOCK COMPANY, *Appellant*.¹

CORPORATIONS — REPRESENTATIONS — CONTRACTS — AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY. The foreman in charge of a large ranch belonging to a corporation had authority to purchase an engine and hay baler, where it appears that he managed the ranch, employed laborers and purchased supplies, and pending the negotiations, the president of the corporation was called over the telephone to discuss the terms of sale and informed the seller's agent that if the deal was satisfactory to the foreman it would be satisfactory to the company.

FRAUDS, STATUTE OF—SALE OF PERSONALTY — ACCEPTANCE — EVIDENCE—SUFFICIENCY. An absolute acceptance of an engine and hay baler is shown, sufficient to take an oral sale thereof out of the operation of the statute of frauds (Rem. & Bal. Code, § 5290, requiring a note or memorandum thereof, in writing, etc., unless the purchaser shall accept and receive part of the goods etc.), where it appears that the agent, authorized to purchase the same, received the engine and baler early in June and hauled them to the purchaser's ranch, where they remained, long prior to the commencement of the action, the purchaser knowing that the seller claimed an absolute sale, delivery, and acceptance, the purchaser making no demand for a test thereof as provided for in the contract.

Appeal from a judgment of the superior court for Adams county, Holcomb, J., entered January 29, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

Sharpstein & Sharpstein, for appellant.

Zent & Cannon and *C. W. Rathbun*, for respondent.

CROW, J.—This action was commenced by Adams County Mercantile Company, a corporation, to recover the purchase price of machinery sold to Walla Walla Livestock Company, a corporation. From a judgment in plaintiff's favor, the defendant has appealed.

¹Reported in 116 Pac. 669.

The machinery consisted of an engine and hay baler. An oral contract of sale, for a consideration of \$851, is claimed to have been made some time in May, 1909, by respondent through J. E. Carman, its president, to appellant through E. Crowley, its agent. Appellant owns a large ranch in Adams county, some distance from Ritzville, which was then in charge of Crowley, its foreman. Respondent claims Crowley, as appellant's authorized agent, purchased the engine and baler for use on the ranch. The case turns upon two contentions made by appellant; (1) that Crowley was not authorized to purchase the machinery as its agent; and (2) that the oral contract of sale was void under the statute of frauds.

On the first proposition, we conclude the evidence is sufficient to sustain a finding of Crowley's authority to make the purchase as agent of appellant. Appellant's office and all of its principal officers were in the city of Walla Walla. Its Adams county ranch was in charge of its conceded agent, Crowley, who as foreman managed the same, employed and discharged laborers, purchased supplies, and approved bills which appellant paid. While it is true no evidence appears to the effect that Crowley had theretofore purchased machinery of any considerable value, it does appear that, when negotiations were pending on the sale in question, the respondent's president, at Crowley's request, telephoned the appellant at Walla Walla to discuss the terms of the sale, manifestly in relation to the time of payment, which was extended to October 1, 1909, and that during the telephone conversation, respondent was informed and advised that, if the deal was satisfactory to Crowley, it would be satisfactory to appellant. The deal thereafter consummated was closed some time in May, 1909, by oral agreement with Crowley, and respondent ordered the engine and baler for delivery to appellant at the city of Ritzville. This evidence was sufficient to indicate that appellant directed respondent to make a satisfactory deal with Crowley, and we think no further

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showing of his authority is necessary. Appellant, being a corporation, was compelled to act through agents, and Crowley, its conceded agent in charge of the ranch where the machinery was needed and was to be used, not only assumed to have, but did have, apparent authority to make the purchase.

Section 5290, Rem. & Bal. Code, provides:

"No contract for the sale of any goods, wares, or merchandise, for the price of fifty dollars or more, shall be good and valid, unless the purchaser shall accept and receive part of the goods so sold, or shall give something in earnest to bind the bargain, or in part payment, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged thereby, or by some person thereunto by him lawfully authorized."

It is conceded the contract of sale was oral; that no earnest was given; that no part payment was made; and that no memorandum in writing of the bargain was signed. The respondent contends, and the trial court necessarily found, the machinery was accepted and received by appellant. It is well settled by the authorities that to satisfy the statute there must be not only a delivery of the goods by the vendor, but also an actual acceptance by the vendee with an intention of taking possession as owner, and that this intent must be evidenced by unequivocal acts. Such intention if it exists must appear from the attending facts and circumstances. Without discussing the evidence in detail, we conclude it is sufficient to show that respondent was to deliver the machinery in Ritzville; that early in June, 1909, Crowley, appellant's agent, received the engine from respondent at Ritzville, and hauled it to the ranch; that a few days later when the baler arrived, he also received and hauled it to the ranch; that some dispute arose between him and respondent as to a belt needed for the baler but not provided; that respondent informed him no belt went with the baler, whereupon he purchased a belt for which appellant made payment; that the engine and baler remained in appellant's pos-

session at its ranch, and were never returned to respondent, and that for several weeks appellant made no offer to return them.

While there was evidence to the effect that the respondent was to start and test the baler, there was further evidence that it was to do so when requested by appellant; that respondent upon demand was to procure an expert for that purpose, who was to be paid by appellant, but that appellant never requested the expert or demanded a test of the baler. It is not disputed that appellant's employee hauled the machinery from Ritzville to the ranch, where it has since remained. Appellant knew the machinery was in its possession long prior to the commencement of this action, and that respondent claimed an absolute sale, delivery, and acceptance. The trial judge who heard the evidence undoubtedly concluded appellant had retained possession a sufficient length of time to show an absolute acceptance and claim of title as vendee. The controlling issues in this cause are issues of fact, and from a careful consideration of all the evidence, we conclude the respondent has sustained the burden of proof imposed upon it.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 9389. *En Banc*. July 24, 1911.]

THOMAS & COMPANY, *Respondent*, v. WHITMAN A. HILLIS
et al., *Appellants*.¹

APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. An order granting a new trial for insufficiency of the evidence to sustain the verdict will not be disturbed where the evidence of witnesses, seen and heard by the trial judge, is conflicting, and no clear abuse of discretion appears.

Appeal from an order of the superior court for King county, Gay, J., entered January 24, 1911, granting a new

¹Reported in 116 Pac. 854.

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trial for insufficiency of the evidence, after the verdict of a jury rendered in favor of the defendants, in an action on a promissory note. Affirmed.

Earle & Steinert and Peters & Powell, for appellants.

Hamlin & Meier, for respondent.

ELLIS, J.—Action by respondent upon a promissory note for \$4,312.50, alleged to have been made and delivered to Northern Pacific Irrigation Company by appellants, and indorsed after maturity to respondent. The answer admits the signing of the note, denies delivery, and sets up as an affirmative defense that the note was signed as part of a transaction in which respondent acted as agent for the irrigation company in the sale of certain lands to appellants; that a contract for the purchase of the lands was signed by appellants and, together with the note, was left with the respondent upon a promise not to deliver the same without the consent of appellants; that the promise was made to defraud the appellants, and the note was secured by fraud and without consideration. The affirmative matter in the answer was put in issue by the reply. The cause was tried to a jury and a verdict returned for appellants. Respondent moved for a new trial, and the court granted the motion on the ground that the evidence was insufficient to justify the verdict and that the verdict was against the evidence. From the order granting a new trial, this appeal was prosecuted.

The appellants contend that the court erred in granting a new trial, because the verdict was sustained by competent evidence, in no way conflicting, showing that the respondent agreed to make a contract satisfactory to appellants, which it never did. It is conceded that, on respondent's solicitation, appellants, on December 17, 1909, went to Kennewick, looked over the land, paid \$500 earnest money on the purchase, and entered into a preliminary agreement or memorandum of sale with the irrigation company. This memo-

randum, after acknowledging payment of the earnest money, specifies the deferred payments, the first of which was for \$4,312.50, payable on or before February 1, 1910, and stipulates as follows:

"It is further agreed that on payment of first payment in full by purchaser, said company will prepare a contract in duplicate on its regular printed form embodying the terms of sale of said lands together with its regular water right agreement, and deliver one copy thereof to purchaser, after the same is executed by both parties. It is further agreed that said purchaser shall forfeit all sums paid as liquidated damages in case of failure to pay the balance of said first payment at the time and in the manner herein provided, time being of the essence of this agreement."

The appellants' evidence tends to show that the note and final contract were signed at the office of respondent in Seattle on January 7, 1910, and were left with the respondent upon a promise not to deliver them to the irrigation company until appellants had time to examine the contract; that on examination the appellant Hillis objected to the contract, and one Marsolais, vice president of the respondent, said: "Well, we will make the contract satisfactory to you," and that the contract was never made satisfactory. The respondent's evidence is in direct contradiction of the simultaneous signing of the note and contract, and is to the effect that the note was signed some days before the contract was signed, and even before the contract was prepared; that the note was made and delivered by the appellant Hillis to respondent for the purpose of securing an extension of time from the irrigation company on the first payment, which was, under the memorandum of agreement, to be paid before the final contract should be prepared. The evidence further tends to show that, by means of the delivery of said note to the irrigation company, the desired extension was secured. Manifestly, if this is true, the appellant Hillis signed the note and authorized its delivery prior to any promise to make the contract satisfactory, and solely upon the promise

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contained in the memorandum to prepare the contract in duplicate on the irrigation company's regular printed form embodying the terms of sale, together with its regular water agreement. If this is true, the note was not secured by fraud nor without consideration. It is not claimed that the contract did not conform to the memorandum agreement. It seems plain that the vital issue in the case was as to the time and purpose of the signing of the note, and there was a direct conflict of evidence as to these.

Moreover, while the promise to make the contract satisfactory was not disputed, there was evidence tending to show that the appellant Hillis placed his duplicate of the contract in the hands of an attorney, indicated the changes desired, and authorized him to act for appellants; that the attorney wrote to the irrigation company pointing out the changes desired; that certain changes were agreed to by the irrigation company, and that the attorney expressed himself as satisfied therewith. The attorney testified that he never stated that the changes were sufficient, thus making a conflict in the evidence on this point also.

A motion for new trial is necessarily addressed to the discretion of the trial court, and this court has steadfastly adhered to the rule that, where the motion has been granted for insufficiency of evidence, the order will not be disturbed, "unless the evidence be undisputed or it appears that there has been a clear abuse of discretion." *Sylvester v. Olson*, 63 Wash. 285, 115 Pac. 175.

Upon a careful review of the evidence we are satisfied that there was sufficient conflict therein on the material issues to invoke the discretion of the trial court, whose duty it was to weigh the testimony of witnesses whom he saw and heard testify. *Best v. Seattle*, 50 Wash. 533, 97 Pac. 772; *Angus v. Wamba*, 50 Wash. 353, 97 Pac. 246; *Farrell Co. v. Ihrig*, 50 Wash. 281, 97 Pac. 52; *Faben v. Muir*, 59 Wash. 520, 109 Pac. 798; *Hughes v. Dexter Horton & Co.*,

26 Wash. 110, 66 Pac. 109; *Rotting v. Cleman*, 12 Wash. 615, 41 Pac. 907.

We are not convinced that in this case there was an abuse of discretion. The judgment is affirmed.

DUNBAR, C. J., MOUNT, PARKER, and FULLERTON, JJ., concur.

[No. 9454. Department Two. July 24, 1911.]

H. B. DAVIES, *Receiver etc., Appellant*, v. JOHN BALL *et al.*,
Respondents.¹

CORPORATIONS — STOCK — BONA FIDE PURCHASER — LIABILITY FOR STOCK SUBSCRIPTIONS. The purchaser of stock in a coal mining company at about one-half its par value, is not liable to creditors upon an unpaid stock subscription where the stock on its face was issued as fully paid and nonassessable, the purchaser had no notice that it was not fully paid, and acted in good faith, the presumption being that he was a *bona fide* purchaser.

SAME. A stockholder who advanced money for the corporation and demanded and received stock in return, issued as fully paid up stock, is not liable to creditors upon an unpaid stock subscription thereon, where he had no notice that it had been issued originally in return for property received at an overvaluation; and the fact that it was returned to the company as treasury stock does not put him on notice of such overvaluation.

SAME. The *bona fides* of a purchase of stock by one advancing money for the corporation is not affected by the fact that indebtedness was subsequently incurred upon the purchaser's representations.

SAME—INCORPORATORS—IMPLIED CONTRACT OF SUBSCRIPTION. Incorporators of a corporation who accept stock without fully paying up for the same, are liable to creditors upon an implied subscription for the stock although no express contract was made by them.

CORPORATIONS—CAPITAL STOCK—SUBSCRIPTIONS—MINING COMPANY—STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7347, permitting mining claims to be transferred to such corporation in full payment of the capital stock without the necessity of stock subscriptions, does not apply to coal mining companies, the stockholders of which are accordingly liable to creditors upon unpaid stock subscriptions as provided by Const., art. 12, § 4, and Rem. & Bal. Code, § 3698.

¹Reported in 116 Pac. 833.

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CORPORATIONS—STOCK—SUBSCRIPTIONS—PAYMENT—PROPERTY OVERVALUED—INCORPORATORS. Where incorporators accepted fully paid up stock in a coal mining company knowing that it was issued in exchange for property taken at an overvaluation, they are liable to creditors upon stock subscriptions to the extent of the amount unpaid thereon.

SAME—BONA FIDE PURCHASERS—PAYMENT IN SERVICES—GOOD FAITH. Persons receiving large blocks of stock in a coal mining company for services rendered in selling a much smaller amount of stock, are put upon inquiry as to the fact that the stock was not fully paid up, and it is incumbent upon them to show that they purchased for value and in good faith, in order to avoid liability to creditors upon unpaid stock subscriptions.

CORPORATIONS—STOCK—UNPAID SUBSCRIPTIONS—ACTIONS—DEFENSES—NOTICE OF OVERVALUATION—ESTOPPEL. In an action by a receiver on behalf of creditors to recover for unpaid stock subscriptions upon stock issued in return for property taken at an overvaluation, a creditor who dealt with the corporation with knowledge that the stock was issued for property of less value than the par value of the stock, is estopped to participate in the fund or seek enforcement of the liability.

CHADWICK, J., dissents in part.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered November 15, 1910, upon granting a nonsuit, dismissing an action by a receiver to collect unpaid subscriptions to corporate stock, after a hearing before the court. Affirmed in part and reversed in part.

E. N. Steele and Troy & Sturdevant, for appellant.

Byers & Byers, for respondent Ball.

Thomas M. Vance, Harry L. Parr, and J. W. Norvell, for respondents Davis *et al.*

ELLIS, J.—Action by a receiver against certain stockholders of a corporation, on behalf of creditors, to collect unpaid portions of stock for which it is alleged the par value was not paid. From a judgment of nonsuit, this appeal was prosecuted.

In the spring of 1909, respondent McArthur secured an option upon certain coal lands in Thurston county, Wash-

ington. The consideration was to be \$35,000, of which \$6,000 was to be paid on May 10, 1909, and the balance in subsequent installments. About the time when he was negotiating for this option, he met the respondent Kraber at Tenino, and arrangements were entered into between them for the organization of a company to develop these coal lands. Kraber undertook to organize and promote the company, and McArthur accordingly executed to him an option similar to that which he held for the lands, the principal difference being that McArthur was to receive \$40,000 for the property, and the first payment was to be \$1,000 on April 1st, and the second payment \$7,000 on May 10, 1909. Thereafter, about April 1, 1909, Kraber organized a corporation known as King Coal Mining Company, with a capital stock of \$500,000, consisting of 50,000 shares of a par value of \$10 each. He assigned the option which he had received from McArthur to this corporation, taking in payment therefor all of the stock of the corporation excepting fourteen shares. These fourteen shares were subscribed for, two each, by the respondents Kraber, McArthur, Newinger, Rainey, Davis, Sornberger, and one J. R. Williams. No other stock was ever subscribed for. The minutes of the first meeting of stockholders held on April 3, 1909, recite that these fourteen shares of stock were paid for in cash by the above named subscribers. Of these Kraber, McArthur, Newinger, Rainey, and Williams, and also the respondent Clement, were incorporators. Kraber was elected president and manager, Newinger, vice president, Rainey, secretary, and McArthur, treasurer. At this meeting the corporation, by resolution, agreed to take over the option from Kraber, and issue to him the remaining 49,986 shares of stock in payment therefor. The certificate for these shares was issued to him on May 3, 1909. Of these shares Kraber, on the same day, transferred 10,000 to himself as trustee to be used for promotion purposes, and 25,000 he transferred to the company to be held as treasury stock. From the remainder of the

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stock Kraber transferred to the respondents Davis, McArthur, Rainey, Newinger, and Sornberger 100 shares each, to the respondent Clement 7,193 shares, and retained 7,193 shares.

The evidence shows that Clement was financial agent of the company, employed in selling stock, and though not clear on this point, seems to indicate that his stock was transferred to him in consideration of services to be rendered in that capacity. It appears that McArthur first aided Kraber in the management of the mine, and later paid a note of the company for \$600 which has not been repaid, and he contends that this and his services paid for his stock in full. There is evidence, also, that Rainey did some typewriting and other clerical work for the company, and the claim was advanced that this was in payment for the 100 shares of stock issued to him.

In the latter part of May, 1909, Kraber visited Anacortes and employed the respondent Funk to aid him in selling stock, Funk in turn securing the aid of the respondent McCallum. Through the aid of these two, Kraber sold to the respondent John Ball 2,000 shares of treasury stock for \$10,000, and also transferred to Ball as a part of the same transaction 3,000 shares of the trust or promotion stock, evidently as a part of the consideration for the \$10,000 which Ball then paid. This stock was all on its face "fully paid and nonassessable." Eight thousand dollars of this money was used in payment of the first and second installments of the purchase price of the property. Funk and McCallum each received for their services in this matter 6,250 shares of treasury stock. Ball was shortly afterward elected trustee of the corporation, but took no active part in the management of the mine until about the first of October, 1909. He advanced various sums of money to meet the payroll and pay debts of the company, and finally in September, when he had advanced about \$3,000 in addition to the \$10,000 paid for the stock, he demanded more stock,

and there was then issued to him 6,860 additional shares. As to the value of the property included in the option which was turned over in payment of the capital stock, the respondent Kraber testified that he took advice of a coal expert who valued it at \$150,000. The receiver, Davies, who was for some time superintendent and afterwards manager of the mine, places a value at from \$35,000 to \$55,000 on the whole property, including equipment and timber. He states that he and Kraber estimated the coal on the land at 3,000,000 tons. Davies also testified that this coal could be sold at a profit of \$1.25 per ton by the installment of proper machinery and equipment. The appellant claims that there was fraud in the inception of the corporation by reason of the overvaluation of this property, and that all of the respondents are liable to creditors for the unpaid portions of their stock.

We are of the opinion that, in any view of the case, the action was properly dismissed as to the respondent John Ball. He was not a subscriber nor an incorporator. In his first purchase of stock there can be little question that he was a *bona fide* purchaser for value. He looked over the property at the time, but it is not claimed that he had any knowledge of coal mines. There was no evidence that he was told or learned of anything which would lead him to believe that the property if properly managed was not worth the full amount for which it was capitalized. It is fairly inferable that the stock was represented to him as paid up. It was on its face "fully paid and nonassessable." He is presumed to be a *bona fide* purchaser. The correct rule in such cases is expressed in 1 Cook on Stock and Stockholders (3d ed.), § 50:

"A *bona fide* purchaser for value and without notice of stock issued by a corporation as paid up cannot be held liable on such stock in any way, either to the corporation, corporate creditors, or other persons, even though the stock was not actually paid up as represented. Such a purchaser

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has a right to rely on the representations of the corporation that the stock is paid up.

"Where, however, a statement is made on the face of the certificate that it is paid-up stock, the *bona fide* purchaser of the certificate need not inquire further, but may rely on that representation, and is protected thereby against liability.

"A purchaser of stock is entitled to rely on statements in the corporate books that the stock is paid up. The law goes still further, and holds that where a person in open market, in good faith and without notice, purchases certificates, such stock is to be deemed 'paid up' in his hands, and he is protected as a *bona fide* purchaser, even though there is nothing on the face of the certificates stating that they are paid up. This can now be laid down as the established rule. It is based on sound public policy, favoring, as it does, the transfer of personal property, and the *quasi*-negotiability of stock, and discountenancing secret liens and constructive notice.

"A purchaser in open market of stock represented to be paid up, by a statement to that effect on the certificate, is presumed to be a *bona fide* purchaser. Hence there has arisen the well-established rule, both in America and England, that a *bona fide* purchaser for value, and without notice, of stock issued as paid up, is not liable for any part of the par value which may not have been paid."

See, also, *Brant v. Ehlen*, 59 Md. 1; *Troup v. Horbach*, 53 Neb. 795, 74 N. W. 326; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814; *Steacy v. Little Rock etc. R. Co.*, Fed. Case, No. 13,329; *Foreman v. Bigelow*, 4 Cliff. (U. S.) 508.

Up to the time when he received the additional 6,860 shares, there is no evidence that he believed the property was not worth the full issue of stock. He was a trustee, but was not often at the mine nor actively connected with its management. The evidence shows that the mine had not been paying expenses, but it also shows that Davies, the present receiver, who was then superintendent of the mine, had reported at a meeting of trustees on July 6th when Ball was present that the reason for this was that more money was needed "in order to produce coal faster and with more

economy." Apparently there was no intimation at that time that the coal was not there or that it was of inferior quality, as the receiver now claims. He testified that the value of the mine or of the option was gone into at that time "only in a general way." In fact, at that time and afterwards, it appears that Ball was led to believe that the mine would pay if more money was put into it, and he did advance sums aggregating about \$3,000 between then and September, for which, on September 28, the additional stock, which was also on its face "fully paid and nonassessable," was issued to him. We think that the evidence even as to this stock fails to show that he was not a *bona fide* purchaser for value. True, he had then access to the books of the corporation and probably knew that the stock he took in payment for these advancements was treasury stock, but that in itself does not charge him with notice that the property was overvalued. If he examined the prior minutes and the stock book he at most knew that the stock had been originally issued in full to Kraber, who had returned it to the corporation to sell for working capital. This is not notice of an overvaluation of the property.

"The fact that the person to whom the stock is issued returns a part of it as a gift to the corporation or to trustees for the corporation to sell the same below par and put the proceeds in the corporate treasury for a working capital does not necessarily prove that the property was overvalued. The person receiving the stock may have been willing to sacrifice a part of his stock and property in order to make the rest more valuable." 1 Cook, Stock and Stockholders (3d ed.), p. 66, § 46.

It is claimed that some \$2,000 of the indebtedness was incurred upon representation made by him after this time. That, however, would not affect his *bona fides* in purchasing the stock. It would be immaterial in a suit by the receiver for nonpayment of stock which he purchased in good faith prior to such representation.

As to the other respondents, a more difficult question is

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presented. The evidence shows that all save Funk and McCallum were connected with the corporation from its inception. All of the others save Davis and Sornberger were incorporators, and they are charged with knowledge that the property was not worth the full amount of the capital stock. It is not claimed that they ever actually subscribed for more than the fourteen shares shown in the subscription list. They cannot be held on an express contract of subscription. The appellant, however, contends that, under § 4, art. 12, of the state constitution, the capital stock is a trust fund for the benefit of creditors, and that the holder of stock which he takes with notice that it has not been paid in full is an implied subscriber and liable for the unpaid part of its par value. There can be no question that an actual subscription is not always necessary in order to establish a stockholder's status as that of a subscriber.

“Any agreement by which a person shows an intention to become a stockholder is sufficient to bind both him and the corporation. When one accepts or assumes the position and duties, and claims the rights and privileges and emoluments, of a stockholder, and the corporation accepts or acquiesces therein, such person is estopped to deny that he is a subscriber, even though there may have been something irregular or defective in the form or manner of his subscription, or there may have been no formal subscription at all.” 1 Cook, *Stock and Stockholders* (3d ed.), p. 86, § 52.

See, also, 10 Cyc. 390, subd. 8.

The acceptance of stock by these incorporators, after having filed articles of incorporation declaring over their signatures that the capital stock was \$500,000 and the shares of a par value of \$10 each, should estop them from claiming that they did not agree to assume also the liability of subscribers for the stock. *Thompson v. Reno Sav. Bank*, 19 Nev. 103, 7 Pac. 68, 3 Am. St. 797.

While all of the stock excepting twelve shares was originally issued to Kraber, he at once, and as it appears in pursuance of the original understanding, issued stock to all

of the other respondents excepting Ball, Funk, and McCallum, who were then strangers to the transaction. We are of the opinion that the incorporators, Kraber, McArthur, Newinger, Rainey, and Clement must be held as subscribers to the extent of the stock issued to them respectively. What then is their liability? Section 4, art. 12, of the constitution, is as follows:

“Each stockholder in all incorporated companies, except corporations organized for banking or insurance purposes, shall be liable for the debts of the corporation to the amount of his unpaid stock, and no more, and one or more stockholders may be joined as parties defendant in suits to recover upon this liability.”

Rem. & Bal. Code, § 3698, declares:

“Each and every stockholder shall be personally liable to the creditors of the company, to the amount of what remains unpaid upon his subscription to the capital stock, and not otherwise.”

The respondents contend that this is a mining corporation within the meaning of Rem. & Bal. Code, § 7347, permitting mining claims to be transferred to such corporations in full payment of the capital stock, that therefore no subscription was necessary, and that respondents cannot be held as subscribers. We do not believe that this statute was ever intended to apply to corporations formed for the mining of coal. The words, “number of feet, shares, or interest in any claim in any mining claim in this state,” seem hardly apt for describing a coal mine, but are the terms commonly used in reference to claims or locations for mining the precious metals. As stated in one of the briefs,

“It appears that the legislature, knowing that no one was able to tell what is in the ground, or the value of a mining claim, placed mining corporations on a different basis from other corporations, and the statute in question is a qualified license to gamble.”

But coal mines in general do not possess the ultra speculative nature of mining claims. Ordinarily coal companies are

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little more inherently speculative than corporations organized for the manufacture of lumber, or to exploit patent rights. While this statute has never been construed by this court, a doubt that it applies to coal mines is expressed in *Manhattan Trust Co. v. Seattle Coal & Iron Co.*, 19 Wash. 493, 53 Pac. 951, and now that the question is directly presented for our decision, we are constrained to hold that the doubt there expressed was well founded. It follows that the respondents Kraber, Clement, McArthur, Rainey and Newinger, who participated in the original transaction as incorporators, are liable as subscribers to the extent of their unpaid stock—that is, for the par value of the stock less the proportionate part of the actual value of the option transferred in payment, and whatever money or other consideration they may be able to show that they have paid for their stock. *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Cox v. Dickie*, 48 Wash. 264, 93 Pac. 523; *Camden v. Stuart*, 144 U. S. 104; *Vermont Marble Co. v. Declez Granite Co.*, 135 Cal. 579, 67 Pac. 1057, 87 Am. St. 143, 56 L. R. A. 728.

The respondents Funk and McCallum occupy still another position. Unquestionably they had nothing to do with the original transaction. They received their stock for services rendered to the corporation in selling stock to Ball. They cannot be held as subscribers because they neither actually nor impliedly subscribed for any of the stock. They are not *prima facie* within the rule expressed in *Campbell v. McPhee*, 36 Wash. 593, 79 Pac. 206, because they did not buy stock upon which nothing had been paid. In that case McPhee purchased stock for cash at much below par, knowing that nothing whatever, neither money nor property, had been paid thereon. His liability was plain from the start. The defense of good faith could not be invoked. As to the two respondents here, the question is simply one of good or bad faith. The evidence before us is clearly sufficient to put these respondents to their defense. The very fact that they

received so large an amount of stock, 6,250 shares each, for effecting a sale of a much smaller amount would indicate, in the absence of proof to the contrary, that they knew the stock was not fully paid. It seems, also, from Kraber's testimony, that these respondents were taken much more fully into his confidence than was Ball. In view of these facts, it is incumbent upon them to show that they were purchasers for value and in good faith. If they were not, the rule laid down in *Campbell v. McPhee* would manifestly apply. *Wishard v. Hansen*, 99 Iowa 307, 68 N. W. 691, 61 Am. St. 238; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551; *Coleman v. Howe*, 154 Ill. 458, 39 N. E. 725, 45 Am. St. 133; *Meyer v. Ruby-Trust Min. & Mill. Co.*, 192 Mo. 162, 90 S. W. 821; 1 Cook, Stock and Stockholders (3d ed.), § 49.

The respondents Davis and Sornberger were not incorporators. While they participated in the original distribution of stock, they seem to have been passive throughout the career of this corporation. If they can show that they paid anything for their stock and took it without actual knowledge that it was not fully paid up, they should be held purchasers in good faith.

There is another matter of defense which may be available to all of these respondents. They should be permitted to show, if they can, that the creditors in whose behalf this action was brought, or any of them, dealt with the corporation with knowledge of the fact that the stock was issued for property of less value than the par value of the stock. Any such creditor will be estopped to participate in the trust fund created by an enforcement of the liability of the stockholders. *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

As to the value of the property, we hazard no opinion, since the evidence before us presents only one side of that question, and there must be a new trial in any event.

The judgment is affirmed as to the respondent Ball. As

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to the other respondents, it is reversed and remanded for a new trial.

DUNBAR, C. J., CROW, and MORRIS, JJ., concur.

CHADWICK, J. (dissenting in part)—I concur except as to that part of the opinion holding Davis and Sornberger. As to them a *prima facie* case was not made out.

[No. 9547. Department One. July 24, 1911.]

*In the Matter of the Estate of GEORGE B. DOANE.*¹

EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNT—ALLOWANCE OF COMPENSATION—EFFECT OF NOTICE—DECREE—FINALITY—VACATION. An order in probate upon the statutory published notice, settling the executor's final account and fixing the amount of his compensation at a sum in excess of the statutory allowance, is within the jurisdiction of the court, and if erroneous is reviewable on appeal as a final judgment; hence it cannot be vacated in the court below for error except upon a proper showing; and it is not sufficient that an applicant for the vacation of the decree alleges that she had no actual notice of the hearing for final settlement, where she had notice of the decree in ample time to have appealed therefrom (DUNBAR, C. J., and FULLERTON, J., dissenting).

Appeal from orders of the superior court for Spokane county, Hinkle, J., entered December 30, 1910, vacating a decree allowing an executor's fees and settling and approving his final account, after a hearing before the court. Reversed.

Graves, Kizer & Graves, for appellant.

Tolman & King for respondents.

PARKER, J.—By this appeal, John M. Bunn, executor of the estate of George B. Doane, deceased, seeks to have reversed certain orders of the superior court for Spokane county vacating the decree of that court settling his final

¹Reported in 116 Pac. 847.

account, in so far as his compensation as executor was by that decree allowed, and fixing his compensation at a less sum.

In November, 1907, appellant was granted letters testamentary under the will of George B. Doane, deceased, by the superior court for Spokane county. Appellant proceeded with the administration of the estate, and on March 16, 1910, the affairs of the estate being ready for final settlement, he filed his final report and account as executor, which, after setting forth a large number of items of receipts and expenditures, concluded as follows:

“Probable cost of closing said estate including executor’s fees \$2,500.00
“Balance on hand to be distributed in cash \$2,552.49

“Wherefore, your petitioner prays that the above account be approved.”

The court thereafter rendered its decree settling this account and allowing compensation to appellant as executor as follows:

“The final account of John M. Bunn, executor of the estate of George B. Doane, deceased, herein rendered and presented on the 16th day of March, 1910, coming on regularly to be heard on this 5th day of April, 1910, and proof having been made to the satisfaction of the court that the clerk had given notice of the settlement of said account in the manner and for the time required by law, and heretofore directed by this court, and no objections being filed thereto, and it appearing that said account is correct; and it further appearing to the court that the sum of \$2,500 is a reasonable amount to be allowed to the executor as his fee in the above entitled estate, and that the same shall also include his fee as administrator *de bonis non* with the will annexed of the estate of Fannie M. Doane, deceased, and also as attorney’s fees for both the said estates of Fannie M. Doane, deceased, and George B. Doane, deceased;

“It is hereby ordered, adjudged and decreed: That the said final account of said executor be and the same is hereby allowed and approved and settled; and that said executor be allowed the sum of \$2,500, as above stated, and is hereby

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authorized to retain the same from the money on hand in said estate.

"Done in open court this 5th day of April, 1910."

In explanation of the reference in the decree to the estate of Fannie M. Doane, it may be noticed that it appears that Fannie M. Doane was the wife of George B. Doane; that she died before George B. Doane; that appellant was also administrator of her estate at the same time; that the whole of the estate of Fannie M. Doane descended to George B. Doane; and that the estate of Fannie M. Doane was apparently not formally finally settled as such. It is not suggested that there was any want of due statutory notice to all persons interested, of the time of the hearing upon which this decree of settlement was rendered. We must then proceed upon the theory that notice was given as therein recited. On May 2, 1910, Jeanette A. Doane, a resident of Massachusetts, a sister of deceased, a residuary legatee under his will, and the petitioner who thereafter sought and procured the vacation of the decree of settlement, signed a receipt under protest for property and money coming to her from the estate under the will, wherein it is recited in substance that the same was in full settlement of all the property and money so coming to her, which receipt was filed in the cause. On June 14, 1910, she filed in the cause her petition praying for the vacation of the decree settling the final account of appellant as executor, in so far as it allowed his compensation; that his compensation be reduced to the sum of \$703.08; and that he be directed to return to the estate the balance of the \$2,500 allowed him by that decree.

The substance of the facts alleged upon which she claimed the relief prayed for is that the total value of the estate was only \$16,576.92; that no extraordinary service was required of or rendered by appellant in the administration of the estate; that he was lawfully entitled to no more than the statutory commission upon the value of the estate as his compensation, amounting only to the sum of \$703.08; that all

of the \$2,500 allowed appellant had been received by him, and "That your petitioner had no notice of the filing of said final report or of the time of hearing thereon, or of the allowance thereof, or of the fee claimed by him or allowed to him as aforesaid until April 12th, 1910." No other facts are alleged tending to show fraud on the part of appellant in procuring the decree of settlement, nor any excuse on the part of petitioner for not appearing at the hearing, nor any excuse for not appealing from the decree of settlement.

Appellant being cited to respond to this petition, demurred thereto for want of sufficient facts to warrant the vacation of the decree of settlement. This demurrer being overruled, he thereupon answered the petition, pleading the regularity of the rendering of the decree; that the same is a final adjudication of the matters sought to be again litigated by the petitioner; and that the allowance made to him as compensation by the decree is reasonable in amount. The matter then came on for hearing upon the issues thus raised. No evidence was offered in behalf of petitioner, and appellant, relying largely upon the former adjudication by the decree, offered but little evidence. This evidence indicates in a very general way his work in connection with the two estates, and also the payment to petitioner and other residuary legatees of the sums coming to them under the will. Upon this hearing the court vacated that portion of the decree allowing appellant's compensation as executor, but made no order fixing his compensation nor of distribution. Thereafter the petitioner and another residuary legatee under the will petitioned the court to fix the compensation of appellant as executor at \$703.08, and direct the distribution of the balance of the \$2,500 theretofore allowed to and retained by him to the residuary legatees under the will. To this petition appellant made substantially the same answer and defense as to the original petition to vacate the decree. These defenses being deemed insufficient by the court, without receiving further evidence, it made an order fixing the compensation of appellant as executor at the sum of

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\$703.08 and directing him to distribute to the residuary legatees the balance of the \$2,500 theretofore allowed and retained by him. The trial court settled a statement of facts which purported to contain all of the material facts in connection with the vacating of the decree and the order of allowance and distribution made thereafter. This has enabled us to see what material facts were before the court, if any, other than appear in the petition to vacate the decree. We mention this to show that in determining the rights of the parties here we have to resort almost wholly to the facts stated in that petition. John M. Bunn has appealed from these orders, contending, in substance, that the decree of April 5, 1910, settling his final account and determining his compensation as executor, was a final adjudication upon those questions; that such decree was not subject to vacation upon the facts presented to the court by the petitioner; and that there are no facts here shown which entitle the petitioner to have that decree reviewed other than by appeal therefrom to this court.

A decree settling a final account of an executor or an administrator when rendered upon due statutory notice, as this decree was so rendered, has all of the force, effect and finality of any other final judgment rendered by a superior court. This is not only evident from the very nature of the statutory notice and procedure provided for and leading up to the rendition of such a decree, but seemingly for the purpose of removing all doubt upon the question and putting probate decrees of this nature upon the same firm basis as to their finality as all other final judgments are. Our statute has, since early territorial days, expressly provided that:

"The settlement of the account and the allowance thereof by the court, or upon appeal, shall be conclusive against all persons in any way interested in the estate, . . ." excepting certain persons under disability. Laws of 1854, p. 297, § 182, Rem. & Bal. Code, § 1566.

As a general proposition of law, this is not seriously con-

troverted by respondents; but they argue that the question of appellant's compensation was not so involved in the issues arising upon the final settlement as to render the decree final upon that question as against them. They seem to rely upon the allegations in the petition to vacate the decree, (1) that the petitioner had no notice of the filing of the report or of the hearing thereon; and (2) that the petitioner had no notice of the fee claimed by appellant or allowed to him until after the decree was rendered. As to the first, it means no more than that she did not know of the time of the hearing, in view of the conceded fact that legal notice of the hearing was given. This notice made the respondents bound to know such facts, in the absence of some legal excuse, which has not been shown. The mere fact that they did not actually know, is not sufficient excuse of itself for not appearing or appealing from the decree. They knew all the facts long before their time for appeal expired. As to the second, while the final account did not state exactly how much was going to be claimed by appellant as his compensation, it clearly informed all persons interested that compensation was going to be claimed, and it seems apparent from the whole report and account that more than the mere statutory commission was going to be claimed in the settlement. Indeed, it is apparent from the report that the \$2,500 was going to be claimed, largely, if not wholly, as compensation by the appellant; for other costs and expenses of the estate appear therefrom to have been then practically all paid. Indeed, such proved to be the fact, for none of the \$2,500 was needed for any expense save for appellant's compensation.

Under our administration laws it seems clear that the fixing of compensation of executors and administrators is a subject for determination upon the settlement of the final account. If so, the portion of the decree of settlement by which such compensation is fixed must be a final adjudication upon that as well as all other matters involved. It might well be argued that the determination of that matter by the settlement de-

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cree would be final even though the final account was silent thereon. That exact question, however, we need not now decide. There was in any event enough in this final account to bring that question before the court for determination in connection with its settlement. This court has held that the allowing of compensation of executors or administrators in the settlement of the final account is appealable upon the theory that it is a final adjudication as to such allowance. *Horton v. Barto*, 17 Wash. 675, 50 Pac. 587; *Wilbur v. Wilbur*, 17 Wash. 688, 50 Pac. 589.

Counsel for respondents argue that the allowance of the compensation in the decree of settlement being more than the statutory commission, such allowance was to that extent without the jurisdiction of the court. We think that if the compensation then allowed was legally excessive, its allowance was in any event no more than error, and was not void for want of jurisdiction.

In *Miller v. Major*, 67 Mo. 247, the court, having under consideration an alleged illegal allowance made to an executor in the final settlement of his account by the county court, said:

"The final settlement of the executor, which is sought to be impeached and overthrown by this proceeding, stands upon the footing of a final judgment, rendered by a court having jurisdiction of the person and subject-matter, and it cannot be vacated on the mere ground that an illegal allowance had been made in favor of the executor. To justify its vacation it is not sufficient to show that the allowance was not properly made, but it must further be established that it was procured by fraud, to the injury of the estate or some party interested. 20 Mo. 87; 23 Mo. 95; 27 Mo. 399; 37 Mo. 300; 47 Mo. 390; 54 Mo. 200; 62 Mo. 418. In the case last cited, Judge Hough, in his opinion, observes: 'Any relaxation of the rule for the purpose of meeting apparently hard cases, can only result in making our judgments partial and confused. Ample time is given by the statute for taking appeals from the final settlement of guardians and curators, and it is better that all concerned should understand that some solemnity

and binding force attaches to such settlements, and that they cannot be overhauled years afterwards, to the detriment of innocent parties, merely on account of illegal allowances. Such settlements must stand, unless tainted with fraud or reversed on appeal.' "

In *Mock v. Pleasants*, 34 Ark. 63, dealing with a similar situation, the court said:

"The complaint contains no averment that the allowances made to the administratrix upon her settlement were obtained by any misrepresentation or deception practiced upon the court. The facts, so far as anything to the contrary appears, were all before the court, and understood by it, and its decisions fairly made. Mere illegal allowances to an administrator are no grounds for impeaching or setting aside a settlement."

It does not appear from these decisions that the alleged illegal allowances were for compensation; but if such allowances in favor of the executor were in fact illegal, they would come as near raising jurisdictional questions as if allowance had been illegally made for compensation. One is as much the subject of the court's determination as the other. They both involve questions of law and fact, calling for the trial court's decision, and an erroneous decision thereon would not show want of jurisdiction.

The following cases support the holding of this court in *Horton v. Barto* above cited, to the effect that the allowance of the executor's compensation by the decree settling his final account is a final judgment upon that question: *Branson v. Branson*, 102 Mo. 613, 15. S. W. 74; *Ringgold v. Stone*, 20 Ark. 526; *Simonds v. Creswell*, 10 La. Ann. 318; *Thomas v. Frederick Co. School*, 9 G. & J. (Md.) 115; *Mount v. Slack*, 45 N. J. Eq. 129, 17 Atl. 297; *In re Prentice*, 25 App. Div. 209, 49 N. Y. Supp. 353.

Counsel for respondents make some contention that the settlement decree was in any event not final to the extent that the superior court could not set it aside at any time prior to the final discharge of the executor. It is argued that the

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court, until that time, has jurisdiction over the estate, and that until then the decree has only the effect of an interlocutory order. This view would have some support if the decree were one other than a decree rendered upon a statutory notice and we had no statute declaring as to its finality. Now a probate cause is not for all purposes one single case with no final judgment therein except that which is rendered at its conclusion. There are certain proceedings in the progress of the administration of the estate which are within themselves, so far as determining the rights of parties involved therein, in a sense independent proceedings. If this be not the correct view, then the notices provided by law for the hearings in such proceedings are to no purpose. What object would there be in giving the notice of hearing in these various intermediate proceedings if the determination thereon was not to be final?

The court of appeals of New York, in the case of *Matter of Accountings, Executors of Tilden*, 98 N. Y. 434, having under consideration the question of the finality of the settlement of several successive accounts, said:

"It appeared that, upon the various accountings before the surrogate, each subsequent account was based upon the one preceding, and that the balance of assets found and adjudged to be in the hands of the executor by the prior decree was made the foundation of the next account. It would thus appear that the validity of each previous account and decree, being unchallenged by any objection, was assumed and adjudged to be correct in each succeeding accounting and judgment. The balance appearing by the third decree was upon the fourth accounting stated in the account as the just and true amount of the assets in the hands of the executors at the date of that decree; and any of the heirs or legatees might have controverted that allegation if any reason existed why the decree fixing that amount was not binding upon him. It follows that each successive decree instituted upon citations, duly issued and served upon the parties interested in the estate, whether adults or minors, and based upon proceedings regularly conducted, was binding and conclusive

upon each of such persons, as to the validity of any prior decree which entered into and was made the basis of the subsequent accounting. There can be no doubt that these various decrees were binding upon all of the adult heirs and legatees who were duly cited to appear. . . .”

The same court in affirming the case of *In re Prentice* above cited, which had been determined by the supreme court of that state, said:

“That the accounting may be an intermediate one, in the sense that the estate is not now finally distributed, does not affect the final character of the decree. It terminated the proceeding, and, so far as it determined any question raised upon the accounting, it is conclusive upon the parties interested and who were cited until reversed upon appeal.”

See, also, *In re Prentice*, 160 N. Y. 568, 55 N. E. 275.

The supreme court of Missouri in discussing a similar situation in *Branson v. Branson*, *supra*, said:

“The case was heard and judgment rendered on appeal in the circuit court at its February term, 1887, but no motion for new trial or bill of exceptions was filed at that time. At the following August term the defendants sought to have the administrators charged with commissions which had been allowed to them in the previous settlement, on the ground that they had agreed to administer the estate free from charges for their services, but the evidence was excluded. The judgment rendered by the circuit court at its February term gave to the administrators the commissions which the defendants now seek to have charged back. That judgment is final and conclusive. It settles the right of the administrators to have the commissions, so long as it remains in full force and effect. The evidence was therefore properly excluded. No timely appeal was taken from that judgment, and the judgment and proceedings in the circuit court leading to it are not before us for review. It is true the circuit court made an order for the sale of the notes, accounts, and stock, and directed the administrators to report to the next term of that court, and then made an order like that made by the probate court continuing the settlement to the next term for final approval, but this continuance had reference to the fu-

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ture orders which the court supposed it had a right to make and did not keep open the judgment then rendered."

See, also, *Rhodes' Appeal*, 39 Pa. St. 186; *In re Irvine's Estate*, 209 Pa. St. 325, 58 Atl. 618; *Summerlin v. Floyd*, 124 Ga. 980, 53 S. E. 452; 18 Cyc. 1190.

As opposed to this doctrine, counsel for respondents rely upon three decisions of this court. The first is *Hazelton v. Bogardus*, 8 Wash. 102, 35 Pac. 602. That case involved an attempt of heirs to quiet title to property descending to them from an ancestor, pending the administration of the estate. The court simply held that as the law then existed such a suit could not be maintained by heirs, and that since the estate had not been finally closed by a decree of distribution and discharge of the administrator, the court still had jurisdiction over the estate, notwithstanding the final account of the administrator had been settled. There is nothing in that decision indicating that the court regarded the matters adjudicated by that settlement other than final. The second is *State ex rel. Reser v. Superior Court*, 13 Wash. 25, 42 Pac. 630. In that case there was an attempt to have this court review by certiorari an order of the superior court setting aside a conditional order discharging an administrator upon his final accounting. This court declined to entertain the writ, saying:

"It appearing that the administrator has not been discharged, it follows that the court has jurisdiction of the proceedings, and could set aside its previous order. As to whether there were sufficient grounds to sustain such action would be a matter reviewable on appeal. Consequently, there was no ground for the issuance of a writ of certiorari to review the same. . . ."

The grounds upon which the superior court set aside the order do not appear. This court only held that the superior court had jurisdiction to do so. We are not holding in this case that the superior court has not jurisdiction to set aside a decree settling a final account upon a proper showing. Our

holding here is that the superior court in this case erroneously set aside the decree of settlement for want of sufficient showing. The third is *Shufeldt v. Hughes*, 55 Wash. 246, 104 Pac. 253, where this court said: "The vacation of the first decree of settlement was largely in the discretion of the court." A critical reading of that case will show that this language had reference to the conditions which the trial court attached to its order vacating the settlement decree. There does not seem to have been any controversy as to the court's jurisdiction to set aside the decree, or as to there being sufficient showing there made to warrant such an order. We are not able to see that the question we are here concerned with was either involved or decided in that case.

We find, then, that we have here a decree fixing the appellant's compensation, which is a final adjudication upon that question. Alleged errors which occurred in the rendition of that decree were sought to be reviewed in the superior court by moving its vacation instead of appealing therefrom. We have many times held that this cannot be done. The reasons therefor are fully stated in *Sound Inv. Co. v. Fairhaven Land Co.*, 45 Wash. 262, 88 Pac. 198, where our previous decisions are cited and reviewed. This doctrine was reaffirmed in the late case of the *State v. Tenney*, 63 Wash. 486, 115 Pac. 1080.

We are of the opinion that the respondents have not shown, either by petition or otherwise in the superior court, sufficient facts to entitle them to have the decree settling appellant's final account and allowing his compensation as executor vacated; or the adjudication thereby made reviewed in any manner except by appeal to this court. We conclude that the orders appealed from must be reversed and set aside. It is so ordered.

MOUNT and GOSE, JJ., concur.

DUNBAR, C. J., and FULLERTON, J., dissent.

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Syllabus.

[No. 9217. *En Banc*. July 26, 1911.]

CHLOPECK FISH COMPANY *et al.*, *Appellants*, v. THE CITY OF
SEATTLE *et al.*, *Respondents*.¹

NAVIGABLE WATERS—CONTROL—COMMERCE—HARBOR AREA—STREETS—CONSTITUTIONAL PROVISIONS. City streets may be extended in any direction over the harbor area to deep water at the outer harbor line, under Const., art. 15, § 1, providing that the harbor area between the inner and outer harbor lines shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce, and art. 15, § 3, granting to cities the right to extend their streets "over intervening tide lands to and across the area reserved as herein provided."

NAVIGABLE WATERS—LANDS UNDER WATER—HARBOR AREA—STREETS—TITLE OF STATE. The granting by the state to a city of an easement of a street over harbor area is not a surrender of title by the state, the state having plenary control over streets, which may be delegated to municipalities.

SAME. The provisions of Laws 1890, p. 731, § 5, authorizing the establishment of waterways to be extended inland across tide lands, including, if practicable, navigable streams, and which are to be forever reserved for public ways for water craft, has no application to street extensions across tide lands and harbor area.

NAVIGABLE WATERS—HARBOR AREA—STREETS—PLATS—DEDICATION—MUNICIPAL CORPORATIONS—USE OF "CITY SLIP." In a plat of streets across tide lands and harbor area, the designation at the end of certain streets, "city slip," does not indicate that such streets were to be reserved as open spaces for vessels, but rather, that they were dedicated to the city for a usable connection of the street with the open harbor, especially when such had been the previous use, and that intent was explained to the legislature at the time of the adoption of the plat.

MUNICIPAL CORPORATIONS—STREETS—ACROSS HARBOR AREA—IMPROVEMENT—WHARVES—NAVIGABLE WATERS—COMMERCE. A city of the first class has authority to construct in a city street extending to deep water across the harbor area, between the inner and outer harbor lines, a gridiron wharf for use as a public landing and convenience to navigation in connection with the use of the street, under its general powers conferred by Rem. & Bal. Code, § 7507, providing that it may construct and maintain public landing places, wharves, and docks, and extend its streets across tide lands and

¹Reported in 117 Pac. 232.

harbor areas in such manner as will best promote the interests of commerce.

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAKING PROPERTY—WHARF IN EXTENSION OF STREET—DAMNUM ABSQUE INJURIA. Where a plat of city tide lands and harbor area showed the dedication of a street as a "city slip," giving the public as much right to use the same as property owners, the construction by the city of a gridiron wharf for public use in that portion of the street extending across the harbor area is not a taking or damaging of private property of abutters who had previously leased from the state the harbor area abutting on such portion of the street, for the purpose of maintaining docks and wharves in aid of commerce and navigation; any inconvenience suffered in the use of improvements thereon being *damnum absque injuria*.

CHADWICK and MOUNT, JJ., dissent.

Appeal from a judgment of the superior court for King county, Main, J., entered July 6, 1910, in favor of the defendants, dismissing an action to enjoin a city in the construction of a wharf in a street extended over tide lands and across the harbor area, after a hearing before the court. Affirmed.

Kerr & McCord and Farrell, Kane & Stratton, for appellants, contended, among other things, that the city has no authority to place or maintain structures in a street that interfere with its public use as a street or affects the beneficial enjoyment of abutting owners. 28 Cyc. 853; Elliott, *Roads and Streets* (2d ed.), 647; Dillon, *Municipal Corporations*, p. 660; *Hill v. New York*, 139 N. Y. 495, 34 N. E. 1090; *Barrows v. Sycamore*, 150 Ill. 588, 37 N. E. 1096, 41 Am. St. 400, 25 L. R. A. 535; *Morrison v. Hinkson*, 87 Ill. 587; *Lutterloh v. Cedar Keys*, 15 Fla. 306; *McIlhinny v. Village of Trenton*, 148 Mich. 380, 111 N. W. 1083, 118 Am. St. 583, 10 L. R. A. (N. S.) 623; *Davis v. Appleton*, 109 Wis. 580, 85 N. W. 515; *Harrisburg's Appeal*, 7 Pa. Cas. 322, 10 Atl. 787; *Bischof v. Merchants' Nat. Bank*, 75 Neb. 838, 106 N. W. 996; *Harding v. Cowgar*, 127 Ind. 245, 26 N. E. 799; *Viebahn v. Board of Com'rs*, 96 Minn. 276, 104 N. W. 1089, 3 L. R. A. (N. S.) 1126; *Hughes v. Providence etc.*

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R. Co., 2 R. I. 498; *Pettit v. Grand Junction, Greene County*, 119 Iowa 352, 93 N. W. 381; *Harper v. Milwaukee*, 30 Wis. 365; *St. John v. Mayor etc. of New York*, 3 Bosw. (N. Y.) 483; *City of Morrison v. Hinkson*, 87 Ill. 587, 29 Am. Rep. 77; *Mayor etc. of Columbus v. Jaques*, 30 Ga. 506; *New Orleans v. United States*, 10 Pet. 662, 719; *Meyers v. St. Louis*, 8 Mo. App. 266; *American Ice Co. v. New York*, 193 N. Y. 673, 87 N. E. 765. "In the absence of express legislation, a city has no implied right under the general powers granted in respect to highways or for its general government to erect a wharf at the end of a public street along a water front and to charge wharfage for the use of the same." *The Geneva*, 16 Fed. 874; *Russel v. The Empire State*, Fed. Case, No. 12,145; *In re Cramp's Appeal*, 13 Phila. 16, 36 Cent. Digest, par. 211; *Galindo v. Walter*, 8 Cal. App. 234, 96 Pac. 505; *Conrad v. Miller*, 2 Alaska 433. The city could not, in the nature of things, have any implied power to encroach on the state harbor areas to erect any structure on the water highways outside the limits of the tide lands. *Commonwealth v. Coombs*, 2 Mass. *489; *Marblehead v. County Com'rs*, 5 Gray 451; *Commonwealth v. Gloucester*, 110 Mass. 491; *St. Louis v. Myers*, 113 U. S. 566; *Seattle & M. R. Co., v. State*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 32 L. R. A. 217. The erection of the proposed gridiron in the harbor area is an unlawful taking of appellants' property. *Story v. New York Elev. R. Co.*, 90 N. Y. 145; *City of Oswego v. Oswego Canal Co.*, 6 N. Y. 257; *Langdon v. Mayor etc. of New York*, 93 N. Y. 129; *Williams v. Mayor etc. of New York*, 105 N. Y. 419, 11 N. E. 829.

Scott Calhoun and H. D. Hughes, for respondents.

ELLIS, J.—The state's first plat of the Seattle tide lands and water front was filed in February 1895. It extended every alternate street of the city streets, originally running to the water front, in a direct line over the tide lands and harbor area to the outer harbor line. Among these streets was Vine street,

which was thus extended a little over 300 feet, practically at right angles to the upland. All of these extensions were 100 feet in width.

In 1897 the city of Seattle caused to be prepared a correction or revision of the above mentioned plat and submitted the same to the state legislature for action thereon, and the legislature, by chapter 28, page 32, Laws of 1897, authorized and instructed the state land commissioners to correct and revise the original plat to conform thereto. By this replat the same streets were extended over the tide lands and across the harbor area to the outer harbor line, not in a direct line as before, but at an angle of about 45 degrees to the upland. The extension of Vine street was thus increased from about 300 feet to over 500 feet. On the revised plat the extensions are all 100 feet in width, excepting Vine street, Madison street and Harrison street the extensions of which are 150 feet in width. All of these extensions or prolongations are designated in large letters as streets, the name in each instance being the same as that of the corresponding upland street, thus "Battery street," "Vine street," etc. In the case of Vine street, underneath the street designation appears in small letters in parenthesis the words "city slip." This is explained by a witness, Mr. George F. Cotterill, who actually made the replat and presented it to the legislature on behalf of the city, as follows: Prior to the adoption of the replat, and for some years thereafter, the city maintained on the site of the proposed present structure, hereinafter described, a public slip or landing place somewhat similar to the one now sought to be enjoined. A copy of this replat, so far as applicable to Vine street, is in the record and shows this old structure. Mr. Cotterill states that these three streets, Vine, Madison and Harrison, spaced practically at uniform intervals along the city's central water front, were platted each 150 feet in width, and the words "city slip" in parenthesis were placed upon each of them and the extra width given with the intention of perpetuating at Madison street and Vine

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street the then existing municipal facilities for slips, public landings and general transition from water to land, and to provide that such could be done at Harrison street whenever the development of the city should demand it. He further says that he explained these things to the legislature as features of the replat and the necessity of these wider streets for the purpose of landings for municipal purposes. This witness also testified that the old structure in the Vine street extension was at a later date remodeled and used as a garbage scow wharf and a public landing generally.

The appellants, the Chlopeck Fish Company and Columbia & Puget Sound Railroad Company, are respectively the owners of the upland and tide land lots abutting the south and north sides of Vine street at its intersection with the waters of Elliott bay. They are also the lessees from the state of the harbor area in front of their respective tide lands. The tide lands on either side of Vine street are narrow, the inner harbor line lying about 20 to 25 feet westward from the westerly line of Railroad avenue, which crosses Vine street at the point here in question practically at right angles. The fish company has built a dock extending outward over the harbor area a distance of 175 feet into a depth of water at the outer end at low tide of about 25 feet. This dock has a frontage of 142 feet. It is of a value of \$150,000. The railroad company has also built a dock on the north side of Vine street extending outward over the harbor area 190 feet. This dock is of a value of \$100,000.

The respondent, the city of Seattle, is proposing to erect, between the inner and the outer harbor line and in the middle of the above described extension of Vine street, a structure which is termed in the record a gridiron. This will be, if constructed, a low wharf or cradle and roadway built on piling, submerged, except as to the roadway, three or four feet at ordinary high tide, so that scows, barges and water craft of like character can be floated over it and allowed to settle upon it for the purpose of unloading and transferring

their cargoes to vehicles which may be driven from the lateral roadway onto the vessels and off again, and likewise for loading. This gridiron wharf will occupy a space about 51 feet wide, including the roadway, and will be 220 feet in length. The southerly 20 feet will constitute the roadway. There will be approximately 50 feet of open water on each side of the structure.

The city has let a contract to its co-respondent for the erection of this structure. It will be for the use of the public and all persons desiring to load and unload thereat brick, sand, gravel, hay, oats, or any other thing or commodity for transportation by water craft of the character above mentioned. The city is intending to establish a wharfage charge to persons using this wharf, to defray the reasonable cost of maintenance. That fact, however, would seem to be immaterial to any issue involved in this case.

The evidence shows that if the appellants extend their docks to the outer harbor line, as they may do under their leases, there will still be 360 feet of open water 150 feet wide alongside the dock of appellant railroad company and 260 feet along the dock of appellant fish company. The appellants brought this action to enjoin the construction of the proposed gridiron wharf, challenging the right of the city to erect it in the place proposed, and claiming that it will injure them in the use of their wharves and will be a damaging of their property without just compensation. A temporary restraining order was granted by the trial court, and upon final hearing this order was discharged, appellants' bill dismissed, and judgment rendered against appellants for costs. From this final judgment, this appeal was prosecuted.

The appellants contend, that the city has no right or authority to erect the proposed gridiron wharf or any other structure in the extension of Vine street between the inner and the outer harbor lines, because, as they claim, that part of this extension is not a street but a part of the harbor area; that the city cannot extend its streets across the harbor area;

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and that the constitution and legislative enactments show an intention to devote the harbor area to the purposes of navigation and commerce by means of "water crafts," and negative any power in the state to extend streets as such over the harbor area.

The initial power of the state to extend streets across the reserved area to the outer harbor line, if it exists at all, must be sought in the state constitution. That document, in § 1, art. 15, provides as follows:

"The legislature shall provide for the appointment of a commission whose duty it shall be to locate and establish harbor lines in the navigable waters of all harbors, estuaries, bays, and inlets of this state, wherever such navigable waters lie within or in front of the corporate limits of any city, or within one mile thereof upon either side. The state shall never give, sell, or lease to any private person, corporation, or association any rights whatever in the waters beyond such harbor lines, nor shall any of the area lying between any harbor line and the line of ordinary high tide, and within not less than fifty feet nor more than six hundred feet of such harbor line (as the commission shall determine) be sold or granted by the state, nor its rights to control the same be relinquished, but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce."

This is the only provision of the constitution authorizing the state through its legislature to provide for the delimitation of any harbor area. By necessary implication it also gives authority to plat the area in order to carry out the purposes for which it is reserved: namely, "for landings, wharves, streets, and other conveniences of navigation and commerce." It is conceded that this section confers power on the state to lay out streets over tide lands, but it is urged that the streets must be confined to tide lands and cannot be laid out across the harbor area. A reading of the section with the context convinces us that this position is not tenable. This section is as plain a recognition of streets as conven-

iences of navigation and commerce as it is of landings and wharves. It evinces no stronger intention to confine streets to tide lands than it does to so confine landings and wharves. Moreover, § 3 of this same article 15, authorizes cities to extend their streets across the harbor area. It reads as follows:

“Municipal corporations shall have the right to extend their streets over intervening tide lands to and across the area reserved as herein provided.”

It can hardly be conceived that the framers of the constitution intended to grant to the state less power in this regard than they thus plainly gave to municipalities. But appellants argue that the last quoted section must be construed as only authorizing cities to extend their streets “to the harbor area over the intervening tide lands,” citing *Columbia & P. S. R. Co. v. Seattle*, 6 Wash. 332, 33 Pac. 824, 34 Pac. 725; *Seattle & M. R. Co. v. Seattle*, 7 Wash. 150, 34 Pac. 551, 38 Am. St. 866, 22 L. R. A. 217; *Seattle v. Columbia & P. S. R. Co.*, 6 Wash. 379, 33 Pac. 1048; *Ilwaco v. Ilwaco R. & Nav. Co.*, 17 Wash. 652, 50 Pac. 572; *State ex rel. McKenzie v. Forrest*, 11 Wash. 227, 39 Pac. 684; *Tacoma v. Titlow*, 53 Wash. 217, 101 Pac. 827. While it is true that in each of those cases expressions to that effect were used, it is also true that all of those cases arose in relation to streets across tide lands only. The present issue was neither involved nor was its decision necessary in any of them. On the other hand, in *State ex rel. Gatzert-Schwabacher Land Co. v. Bridges*, 19 Wash. 428, 53 Pac. 547, and *State ex rel. Port Angeles v. Morse*, 56 Wash. 654, 106 Pac. 147, the right to extend streets across the reserved area is apparently recognized though not directly in issue. The words used in § 3, art. 15, are, “over intervening tide lands to and across the area reserved as herein provided.” They leave no room for construction. It is a fundamental principle, applicable in the construing of all written laws, and especially in construing a document of the gravity of the

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constitution, that if possible an effect must be given and a meaning accorded to all of the words used therein. We have no more authority to eliminate the words "across the area reserved" than we have to cancel the words "over intervening tide lands." We can do neither.

It is next contended that, assuming that the state owns the area between the inner and outer harbor lines, it has not and cannot surrender any of its title to the city of Seattle. But the laying out of a street is not a surrender of title. In fact an easement is all that a city has in nearly all of its streets. That an easement for public use is all that the city takes in streets laid out across the harbor area is implied in the decision of this court that the legislature has the power to vacate streets platted across the tide lands the fee of which was still in the state. The state has plenary control over streets, which it may delegate to municipalities. *Henry v. Seattle*, 42 Wash. 420, 85 Pac. 24; 2 Dillon, Municipal Corporations (4th ed.), § 666.

The provision in § 1, art. 15, of the constitution that no part of the harbor area shall "be sold or granted by the state, nor its right to control the same relinquished," was never intended to defeat the very object of the section as set out in the concluding words of the same sentence, "but such area shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce." The state relinquishes no more of its control by dedicating a street for public use than by making a lease to a private person or corporation. The manifest purpose of this section is to prevent the control of the water front of cities from ever falling into private hands. It was never intended to prohibit, but was plainly intended to insure to cities a usable connection of their streets with the navigable waters of the sea. *State ex rel. Denny v. Bridges*, 19 Wash. 44, 52 Pac. 326, 40 L. R. A. 598. It will be noted in this connection that the prohibition found in the first clause of this sentence against the sale, gift or lease of any rights whatever in the waters

beyond the harbor lines is applied to *private* persons, corporations or associations only.

It is argued that, inasmuch as a city cannot extend its streets across tide lands except in a direct line, as held in *Ilwaco v. Ilwaco R. & Nav. Co.*, 17 Wash. 652, 50 Pac. 572, and other decisions of this court, the state cannot do so, and that, therefore, the Vine street prolongation is not a street but a waterway. It will be noted that the holding in those cases is based upon the significance of the word "extend," found in § 3, art. 15, of the constitution. Neither the word "extend" nor any word of like import is found in § 1 of art. 15, which vests in the state control of the tide lands and harbor area. Unquestionably the state has power to lay out streets over the tide lands in any direction, and that power necessarily includes the authority to prolong existing upland streets either in a direct line or otherwise. Since, as we have seen, this same § 1 of art. 15, confers upon the state plenary control except as to sale or grant, over the reserved area as well as the tide lands, it follows that the state may extend or prolong upland streets over the tide lands and across the harbor area either in a direct line, as it did in the original plat, or at an angle to the upland streets, as it has done by the legislative adoption of the city's replat in the act of 1897 (Laws 1897, p. 32, ch. 28).

We are referred by counsel to the act of March 28, 1890 (Laws 1890, p. 731), as the law in pursuance of which these street extensions were platted by the state, and it is insisted they must be "forever reserved from sale or lease as public ways for water crafts," as provided in § 5 of that act. But that act provides for the establishment of one or more waterways across tide flats, to be not less than fifty nor more than one thousand feet wide. They shall extend inland across the state's tide lands, and where practicable they shall include navigable streams. Obviously it has no application to this Vine street slip, which neither extends inland across the state's tide lands nor includes a navigable stream. The fact

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that the outer harbor line runs straight across the outer end of these extensions, that they are located at the termini of the upland streets, that they are continued of the same width and in the same direction as the streets are extended across the tide lands, and are prominently designated as streets with names corresponding to the upland streets respectively, makes it plain that these spaces so located and named are dedicated as prolongations of the streets.

It is also argued that the word "slip," in the parenthetical designation of the Vine street extension, shows an intention to reserve it solely as an open space for vessels to lie in between the appellants' wharves. The words used, however, are "city slip." The word "city" can no more be ignored than the word "slip." It indicates that the space, whether as slip or street, is dedicated to the city for public use. This designation being placed in conjunction with the principal designation "Vine street," conveys no other intention than to dedicate this space to the city for a usable connection of Vine street with the open harbor, and to confer jurisdiction upon the city to improve it for that use by the public. Moreover, if there is any ambiguity in the plat arising from this double designation, "Vine street" and "city slip," the intention of the legislature at the time of the adoption of the plat may be sought in the light of the facts and circumstances then before that body. This is certainly admissible to explain, though not to contradict, the plat. *State ex rel. McKenzie v. Forrest* and *Ilwaco v. Ilwaco R. & Nav. Co.*, *supra*.

This revised plat was prepared by the city officials, and by them the words "city slip" were placed upon the Vine street extension. At that time there was in the old extension of Vine street a structure similar in character and use to the one here sought to be enjoined. This old structure was shown on the replat. The words "city slip" were used thereon with the avowed intention of continuing the facilities for use of the slip in connection with Vine street in the same manner as be-

fore. These things were explained to the legislature when it adopted the replat. In the light of these facts it can hardly be doubted that the legislature intended to authorize a continuance of the former use of the slip.

It is argued with much stress that the deflection of all these street extensions from a straight line is evidence that they were intended solely to accommodate large vessels and to extend the wharfage facilities of the leased area. But, as counsel for the appellants stated in argument, there were other advantages thus gained. Railroad spurs could thus be laid upon adjacent wharves, running to their face without making an acute and impracticable curve. Vessels, whether large or small, scows and barges in tow, could enter at an easy angle without making a sharp turn as they approached the shore. The deflection is plainly as advantageous to the use proposed by the city as to the use by appellants. It is advantageous for all interests concerned, the city, the lessees of adjacent wharves, and the railroads. It will also facilitate the construction of much longer private slips when required.

The appellants concede the right of the city to extend and improve its streets over tide lands, but contend that it has no authority to place any structure in the streets. They cite in support of this, *Globe Mill Co. v. Bellingham Bay Imp. Co.*, 10 Wash. 458, 38 Pac. 1112, where the court recognizes, *arguendo*, that both tide lands and intervening streets will ultimately be filled and become "solid land." This may be granted, but it seems far from holding that the terminus of a street may not be extended by a wharf or gridiron to make a practicable connection of solid land and navigable water. It is also true that in *West Seattle v. West Seattle Land & Imp. Co.*, 38 Wash. 359, 80 Pac. 549, the maintenance of a ferry slip in the street by private persons was enjoined as a nuisance on complaint of the city, but that is hardly authority for the contention that the city cannot lawfully maintain a slip and wharf at the terminus of a street, extending the same into navigable water for the use and convenience of the

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general public. It is true, also, that neither the city nor any one else can lawfully erect a stand-pipe, or a steam engine, or an electric light plant, or a water tank, or a city hall, or a dumping board, or any other structure of like character in the streets, as held by other authorities cited by appellants; but there is a wide difference between these things and the construction of a wharf by the city at a street termination, leading into navigable water giving public access thereto, and in aid of general traffic between land and water. This is not only not inconsistent with the use of the street as a public highway, but is actually in aid of such use.

The appellants further contend that the city of Seattle is not authorized by any legislative act to erect a gridiron or a pier in any street extension over either tide lands or harbor area, and has no implied authority to do so. We cannot review in detail all of the authorities cited in this connection without unnecessarily lengthening this opinion. We will, however, refer to a few of them. In *The Geneva*, 16 Fed. 874, which more nearly sustains appellants than any other case cited, it appears that the borough of Elizabeth existed by virtue of a legislative charter which did not confer express authority upon the municipality to construct or own a wharf either in a street or elsewhere, or to exact tolls or wharfage for the use of any wharf. The court held, therefore, that it could not charge wharfage for the use of a wharf which it had constructed in a street. The only question directly involved was that of the right to charge wharfage. The case is not applicable to cities possessing the broad powers conferred by the enabling act upon cities of the first class in this state.

Russel v. Empire State, Fed. Case, No. 12,145 arose on libel for wharfage. Woodward avenue, in the city of Detroit, terminated at the water's edge of the river Detroit, a navigable stream. The city erected a wharf at the foot of the avenue extending beyond its terminus into the river. The city leased this wharf to the libelant, giving him "the sole and

exclusive right to use the public wharf for his ferry boats." It was held that he could not collect wharfage as to other vessels mooring there. The court says:

"Unquestionably the city may improve, ornament and grade for public convenience, either by enlargement or extension, the public streets; and with a view to public accommodation, erect at their termini, in the river, suitable wharves or landings, but, by so doing, such erections become free to the public, as extensions of the streets, and the city has no authority, and can confer none, to exact toll for egress or regress."

The court, so far from denying the right of the city to extend the wharf into navigable water for public use in connection with the street, distinctly recognizes that right.

In re Cramp's Appeal, 13 Phila. 16, was decided under a statute of Pennsylvania giving the riparian owner the right to construct a wharf in front of his property on procuring a license from the port wardens. The court held that this right was appurtenant to the fee of the upland, that the fee of the street was not in the city but in the owners of property abutting the street, hence the port wardens could not grant a license to the city to construct a sewer to the warden's line to be covered and protected by a wharf. The court further held that the application was not made for the purpose of creating dock or wharf facilities but in aid of sewerage, which was not a proper basis for an application to construct a wharf. The Pennsylvania rule as to riparian rights in the harbor area has no application in this state. The preferential right of the owner of abutting lands to purchase tide lands and to lease the harbor area in front thereof has no analogy to riparian rights in other states. *Gifford v. Horton*, 54 Wash. 595, 103 Pac. 988; *Eisenbach v. Hatfield*, 2 Wash. 236, 26 Pac. 539, 12 L. R. A. 632.

We have examined the other authorities cited by appellants but they have no important bearing upon the question here involved, in view of the powers conferred upon cities of the first class in this state.

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The enabling act, Rem. & Bal. Code, § 7507, confers upon cities of the first class powers as follows:

“(7) To lay out, establish, open, alter, widen, extend, grade, pave, plank, establish grades, or otherwise improve streets, alleys, avenues, sidewalks, wharves, parks, and other public grounds, and to regulate and control the use thereof.

“(26) To deepen, widen, dock, cover, wall, alter, or change the channels of water ways and courses, to provide for the construction and maintenance of all such works as may be required for the accommodation of commerce, including canals, slips, public landing places, wharves, docks, and levees, and to control and regulate the use thereof;

“(27) To control, regulate, or prohibit the anchorage, moorage, and landing of all water crafts and their cargoes within the jurisdiction of the corporation;

“(28) To fix the rates of wharfage and dockage, and to provide for the collection thereof, and to provide for the imposition and collection of such harbor fees as may be consistent with the laws of the United States;

“(37) To project or extend its streets over and across any tide lands within its corporate limits, and along or across the harbor areas of such city, in such manner as will best promote the interests of commerce.”

Under the authority conferred by § 10, art. 11, of the constitution, the city of Seattle in its charter has affirmatively assumed all of these powers. To conserve space we quote only one of these charter provisions. A part of art. 4, § 18, subd. 37, asserts the power of the city:

“To project or extend or establish streets over and across any tide lands within the corporate limits of the city and along or across any harbor areas of the city, in such manner as will best promote the interests of commerce, and to excavate and improve, for the use as public slips or wharves, any of said streets, and to use all or any portion of every street extending to or projecting into the water as a public slip or wharf.”

In the light of the sweeping powers conferred by the enabling act, we are constrained to hold that the city of Seattle was warranted in assuming the right asserted in the last

clause of the above quoted charter provision, and that it has the power to construct the proposed gridiron wharf in the Vine street slip. In this we are sustained by ample authority.

In *McMurray v. Mayor etc. of Baltimore*, 54 Md. 108, a case in every way analogous to this, the court says:

“In a city situated on navigable water, nothing is of more importance than the privilege of constructing wharves or piers for the benefit and promotion of commerce.”

After reviewing various authorities, the court concludes:

“In our judgment the dedication of Cross street to the public use as a street extending to the water carried with it by necessary implication, the right of the city to extend it into the harbor by the construction of a wharf at the end thereof.”

In *Backus v. Detroit*, 49 Mich. 110, 13 N. W. 380, 43 Am. Rep. 447, the street extended to the water front. In front of the lots on either side of the street the owners had constructed wharves two hundred and eighty-five feet and two hundred and seventy feet in length. The complainant, one of these owners, had excavated the space between the side lines of the street extended and was using it for a slip. He sought to enjoin the city from constructing a wharf therein for which work it had let a contract. The court, after an exhaustive review of the authorities, denied the injunction, using the following language:

“Authority, therefore, is very clearly and decidedly with the city, and the cases which favor its claim make no account of the question whether the title to the land under the water was or was not in the proprietor of the shore.”

Dillon's Municipal Corporations (4th ed.), in § 110, states the law as follows:

“Where *streets terminating or fronting on navigable waters* have been established, whether by condemnation or dedication, and whether the fee is in the municipality or in the adjoining proprietor, the municipality, under legislative authority to establish and regulate wharves, may cause pub-

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lic wharves to be constructed at the ends or in front of such streets and receive the wharfage from the same; and this is no invasion of the rights of the owner of private property abutting on such streets, or of the rights of the adjoining riparian proprietor."

The following authorities are to the same effect: Gould, Waters (3d ed.), § 106; *Barney v. Mayor etc. of Baltimore*, 1 Hughes 118; *Haight v. Keokuk*, 4 Iowa 199; *Barney v. Keokuk*, 94 U. S. 324; 28 Cyc. 853; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672; *Newport v. Taylor's Ex'rs*, 16 B. Mon. (Ky.) 699.

It is argued with insistence that the use of these street extensions by the city as it now proposes to use the Vine street slip would limit the commerce of Elliott Bay to the front of the docks, since if it can so use one street it can all. The argument from convenience is sometimes accorded much weight, but in this instance it is hardly sound. Any private dock owner can construct a slip for his own private use if the use by the public of the public slips is incompatible with his use of them to his best advantage. Apparently the state is under no greater obligation to furnish him an exclusive slip free of charge than it is to supply him with an exclusive dock free of charge. Moreover, these appellants, by extending their docks to the outer harbor line, which the evidence shows is entirely feasible, will each have a greater dock frontage upon the open part of the slip outside of the city's gridiron than they now possess in the absence of the gridiron. If we give ear to the argument from convenience, it may be said that if the city cannot improve the Vine street slip for use in connection with that street then it cannot so improve any street. The street termini would thus be useless so far as the public is concerned. It is fairly inferable from the evidence that the present use of this Vine street slip is practically confined to that of the appellants. Their use, in the nature of things, must remain exclusive so long as the public has no means of using it in connection with the street.

It is manifest paradox to say that the general public has an equal right with the appellants to its use, which is certainly true, but that the city has no power to provide the facilities necessary to that use. It seems more consonant with reason, as well as authority, that the conceded existence of the right to use implies the power without which the right would be nugatory.

Finally, the appellants contend that the erection of this gridiron wharf is an unlawful taking of their property. They do not claim an exclusive property right in this Vine street slip, but assert that their purchase of tide lands and leases of harbor area in front thereof as platted implied a compact between the state, the city, and the appellants that no such structures should ever be erected in this Vine street city slip. From what we have already said it is manifest that this position is not tenable. We have seen that the state was authorized by the constitution to lay out streets across the harbor area to the outer harbor line; that it laid out this prolongation of Vine street and designated it "Vine street" "city slip" upon the plat by the act of 1897; that the city is authorized by the enabling act to construct wharves and landings and to control and maintain the same; that it has assumed this authority in its charter; that the city having statutory authority to construct and maintain wharves, has the implied authority to erect and maintain wharves at the termini of its streets and to extend the same into navigable water; that the plat of the Seattle tide lands and water front, with reference to which the appellants purchased their tide lands and leased the harbor area in front thereof, shows a dedication of this slip to the city for public use as a prolongation of Vine street; that the general public has an equal right with the appellants to use this slip for the purposes for which it was platted, and that this right carries with it the authority to provide facilities without which the right to use would be in effect denied to the public. It follows that no right of the appellants will be invaded by the

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city in the creation of such facilities. They acquired their holdings with knowledge of the public right. *State ex rel. Bartlett v. Forrest*, 12 Wash. 483, 41 Pac. 194; *Kenyon v. Knipe*, 2 Wash. 394, 27 Pac. 227, 13 L. R. A. 142. Any damage or inconvenience which they may suffer by reason of the exercise of that right by the construction of a gridiron wharf, making a practicable connection between Vine street and the navigable waters of Elliott Bay, will be *damnum absque injuria*.

"This is no invasion of the rights of the owner of private property abutting on such streets, or of the rights of the adjoining riparian proprietor." 1 Dillon, Mun. Corp. (4th ed.), § 110.

See, also, *McMurray v. Mayor etc. of Baltimore* and *Barney v. Keokuk*, *supra*; *Gould v. Hudson River R. Co.*, 12 Barb. 616.

The importance to the public of the questions involved in this appeal, the able and earnest manner in which they have been presented by counsel, and the difficulty which we have experienced in reaching a decision, have caused an extension of this opinion to an intemperate length. We will, therefore, not review the decisions cited by appellants on this last point, further than to note that they all rest upon facts so widely divergent from the facts here presented as to take them outside of the principles of law which we conceive to be controlling in this case.

The judgment is affirmed.

DUNBAR, C. J., PARKER, MORRIS, CROW, GOSE, and FULLERTON, JJ., concur.

CHADWICK, J. (dissenting).—I do not concur in the reasoning or the judgment of the majority. The opinion proceeds upon a fundamental error, and in all such cases, the premise being assumed, the argument seems convincing. The error of my associates lies in this: They have assumed that the city has an ownership or superior easement in the so-

called streets as extended over the tide lands. This is not so. The extended street or way is state property, reserved as a convenience of navigation and commerce. Const., art. 15, § 1. The city is, as these appellants are, a mere licensee, and in the absence of express legislation, its privileges are equal, and necessarily the one licensee cannot interfere with the right of the other to use the public thoroughfare of the state. By the constitution, by every law ever passed upon the subject, and by every decision ever pronounced by this court concerning harbor areas, it has been declared that they are to be and remain open for the purposes of navigation and commerce. When the state allowed the same to be leased, that wharves, docks, and other structures might be placed thereon, and platted the same, leaving these open ways of water, it affirmed, as positively as the will of the people can be expressed, that such streets should be water streets or waterways, unobstructed by wharves, docks, and structures of like character, and that they should be open to the whole public. Not to any individual or *quasi* public corporation, or to be put to a particular use by either. Otherwise it would have leased the area so included for the erection of such structures, as it had the undoubted right to do. For the property being that of the state, it might, if it had seen fit to do so, have provided that the city of Seattle, because of its municipal character and the commerce coming to it, should have the right to erect any structure of any character on any part of the reserved area designated and set aside for its use. But it has not done so. Therefore, the questions of policy that are raised and discussed in the majority opinion are legislative questions, and, in the absence of an affirmative grant on the part of the legislature, should not be held to control our judgment.

Another error is that the majority assume that if their decision were otherwise, appellants might have an exclusive right to use the street. But this is not so. The street being an open waterway, they can land vessels at their abutting

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dock and keep them there while loading or unloading. When this work is done, the vessel must proceed on its way or find anchorage elsewhere. And yet, although the rights of the appellants and the city are equal and neither one has a right over the other, this court has nevertheless said that the city may so exercise its license in the property of another, which in terms has been forever reserved to the public, that it destroys the use of it to an adjoining proprietor and defeats the object of the constitutional reservation. The policy of the state to reserve waterways has been so clearly manifested in the several legislative enactments, particularly the act of 1897, wherein it changed the streets so as to make them run at an angle to the upland streets, that it seems almost impertinent for a court to hold that any party, private or *quasi* public can erect permanent structures or eventually fill up at its will its reserved water streets, and thus eventually devote them to exclusive uses. If the legislature has power to do as it pleases with the state's property, it has made no grant to the city, and for its omissions we are not to be held answerable. It is truly unfortunate that the constitution makers and the several legislatures used the word "streets" in the constitution and in the harbor area statutes; for, notwithstanding the fact that the title is in the state, and that the reserved area is, and for all time must be, water and not land, this court has given to the term that meaning which attaches to the country highway threading through the village, and the streets of the city which are admittedly under the jurisdiction and subject to the will of city councils.

MOUNT, J., concurs with CHADWICK, J.

[No. 9225. Department Two. July 29, 1911.]

ORVILLE E. LOVING *et al.*, Respondents, v. A. N. MALTBIE
et al., Appellants.¹

DISMISSAL AND NONSUIT—INVOLUNTARY—FAILURE TO PROSECUTE—DISCRETION. While it is discretionary to dismiss an action for failure to prosecute it diligently, under Rem. & Bal. Code, § 319, it is not an abuse of discretion to refuse to dismiss upon plaintiff's failure to notice it for trial for nearly two years after issues joined, where the plaintiff had not abandoned the action and the defendant might have noticed it for trial, and was, by stipulation, secured the benefit of testimony of a witness who had died in the meantime.

APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—FACTS OTHERWISE ESTABLISHED. Error in the admission of secondary evidence of the contents of a letter is harmless where the loss of the letter was subsequently established.

APPEAL—REVIEW—EVIDENCE—TRIAL DE NOVO. Error in the admission of incompetent evidence is harmless where there is a trial *de novo* on appeal.

TAXATION—FORECLOSURE AND SALE—DEFENSES—PAYMENT OF TAX. A tax deed, upon foreclosure of a delinquency certificate, is void, where, long before the date of delinquency, the owner sent the county treasurer more than enough money to pay all taxes, receipt for which was duly issued, and the certificate of delinquency was issued by mistake of the treasurer, and foreclosure and sale were had without actual notice to the owner.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered May 14, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to set aside tax foreclosure proceedings and for the cancellation of a tax deed issued thereunder. Affirmed.

Arthur McGuire, W. J. Canton, and William M. Clapp,
for appellants.

F. V. Brown and Frederic G. Dorety, for respondents.

¹Reported in 116 Pac. 1086.

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Opinion Per CROW, J.

CROW, J.—This action, originally commenced in Douglas county, in its facts and the legal questions involved is identical in principle with *Loving v. McPhail*, 48 Wash. 113, 92 Pac. 944. The two actions were commenced at the same time, and arose out of the same transaction. Appeals were taken on the same questions, and a stipulation was filed by which it was agreed that the decision of this court in *Loving v. McPhail* should be conclusive on the appeal herein. A statement of the complaint and its allegations will appear in our former opinion.

On January 28, 1908, after remittitur, the defendants answered, making what we construe to be denials only, and not alleging any affirmative defense calling for a reply. In November, 1908, one I. W. Matthews, a prospective and important witness on behalf of the defendants, died after a brief illness. In March, 1909, the legislature divided Douglas county, creating the new county of Grant, in which the land here involved is located. On December 8, 1909, the defendants filed in the superior court of Douglas county a motion for an order of dismissal, on the grounds that the plaintiffs had failed to prosecute the action diligently, or at all, but had abandoned the same, and that they had wholly failed to move against, demur, or reply to affirmative allegations of the answer. This motion, supported and resisted by lengthy affidavits, was conditionally denied by an order entered in the superior court of Grant county, to which the cause appears to have been in the meantime transferred. The condition upon which the motion was denied was that the plaintiffs should, within ten days, file a written stipulation admitting that I. W. Matthews would, if living, give the evidence claimed in affidavits filed on behalf of the defendants, and that such statements might be admitted and considered in all respects as though he were present and testifying, subject, however, to objections as to their relevancy and materiality. The stipulation was filed, and on trial findings of fact were made, upon which a decree was entered in plaintiffs' favor,

quieting their title as against defendants' tax deed. The defendants have appealed.

Appellants first contend the trial court erred in denying their motion to dismiss. The affidavits supporting and resisting the motion are in hopeless conflict. The appellants and respondents each accuse the other of being responsible for the delay. It is apparent, however, that the respondents had not abandoned the action, but that they at all times intended to continue its prosecution. Neither party caused the issues of fact to be brought on for trial by giving the notice authorized by Rem. & Bal. Code, § 319. The appellants could have given such a notice. Where a cause has been pending for an unreasonable length of time without action on the part of the plaintiff, the trial court may, in the exercise of its discretion, dismiss the same as a stale action, and for want of prosecution, and such order of dismissal, in the absence of any abuse of discretion, will not be disturbed upon appeal. *Langford v. Murphey*, 30 Wash. 499, 70 Pac. 1112; *First Nat. Bank of Fond du Lac v. Hunt*, 40 Wash. 190, 82 Pac. 285.

In the first case cited, a demurrer to the complaint, although noticed for hearing, had thereafter remained on file some seven years without being passed upon, and without further action. In *First Nat. Bank v. Hunt*, a delay of three and one-half years after the filing of a demurrer occurred, and it was conceded the plaintiff had placed its claim with an agency for collection independent of the pending action. In each case it was held the trial court did not abuse its discretion in entering an order of dismissal. It does not satisfactorily appear that the respondents at any time abandoned this action. The rule that a dismissal for want of prosecution lies within the sound discretion of the trial judge is well established. The trial court fully protected the appellants by securing for their benefit what they claimed would have been the evidence of the deceased witness had he lived. We are unable to conclude that the trial judge

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abused his discretion or committed prejudicial error in denying the motion.

Other assignments of error are predicated upon the admission of evidence. We think these contentions are without merit. In most instances objections made go to the weight of evidence offered, rather than to its competency. In one instance a carbon copy of an important letter written to the treasurer of Douglas county was introduced and admitted without accounting for the absence of the original. If this was error at the time, it was subsequently cured by evidence which positively disclosed the fact that the original had been destroyed in a fire which burned the county court house where it was on file. As to any evidence that might be regarded as incompetent, it will be sufficient to observe that this cause is now before us for trial *de novo*, and that we will only consider such evidence as we find to be competent.

Applying this rule, we conclude from a careful consideration of all competent evidence, that although somewhat conflicting, it is sufficient to sustain the findings of the trial judge, which in substance are as follows: That on or about May 20, 1899, the Adrian Irrigation Company, a corporation, became the owner of the land here involved, which was then located in Douglas county, now in Grant county; that on May 15, 1902, the irrigation company sold and conveyed the land to respondents by deed containing covenants against incumbrances; that respondents ever since have been owners and in possession; that on April 16, 1902, the irrigation company remitted to the treasurer of Douglas county \$140, with instructions to apply the same in payment of all taxes then due upon the land here involved, and upon other lands to all of which his attention was called by specific description; that \$140 was more than sufficient to satisfy all the taxes then a lien upon all of the lands, including taxes for the year 1898; that the treasurer returned to the irrigation company a portion of the \$140, retaining the remainder, and executed and delivered to the irrigation company a written

statement of the application of the money retained by him; that thereafter, on or about June 27, 1904, the then treasurer of Douglas county issued what purported to be a certificate of delinquency to Douglas county for unpaid taxes for the year 1898; that the certificate was foreclosed; that on December 14, 1904, the treasurer made return that he had sold the land in accordance with the tax judgment to the appellant A. N. Maltbie, to whom a treasurer's deed had theretofore been executed and delivered on November 26, 1904; that appellants having no other claim assert title under the tax deed, which casts a cloud upon the respondents' title; that respondents paid the irrigation company a valuable consideration for the land; that at the time of its purchase by them, they were shown the written statement made to the irrigation company by the treasurer of Douglas county; that they then believed all taxes had been paid; that they had no notice of any tax foreclosure or sale until after the delivery of the treasurer's deed; that prior to the commencement of this action respondents made a lawful tender of money to appellants, sufficient to pay all taxes, interest, penalties, and costs, together with interest upon all of such items paid by appellants for or on account of the land. These findings, under the authority of *Loving v. McPhail*, *supra*, are sufficient to sustain the decree. In that case, we said:

"The only question presented by the appeal is the sufficiency of the foregoing facts to support the cancellation of the tax deed and the removal of the cloud created by the tax foreclosure proceedings. We think the facts stated are amply sufficient to warrant the relief asked. The property holder made an effort in good faith to pay all taxes upon the property long before there was any delinquency, and was clearly prevented from doing so by the mistake or fault of the officer charged with the duty to collect the taxes. More than enough money was placed in the treasurer's hands to pay all taxes, and no further duty rested upon the property holder. It was the duty of the officer to apply the funds to

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Statement of Case.

the extent of the full satisfaction of the taxes. Such an effort by the property owner to pay taxes is the legal equivalent of payment, in so far as to discharge the lien and bar a sale for nonpayment. This court so held in the recent case of *Bullock v. Wallace*, 47 Wash. 690, 92 Pac. 675. The essential questions here involved are discussed in the case cited, and on the authority of that case this judgment must be reversed."

See, also, *Gleason v. Owings*, 53 Wash. 483, 102 Pac. 425, 132 Am. St. 1087; *Blinn v. Grindle*, 58 Wash. 679, 109 Pac. 122; *Puget Sound Nat. Bank v. Biswanger*, 59 Wash. 134, 109 Pac. 827; *Brewer v. Howard*, 59 Wash. 580, 110 Pac. 884.

The judgment is affirmed.

DUNBAR, C. J., CHADWICK, and MORRIS, JJ., concur.

[No. 9390. Department Two. July 29, 1911.]

J. I. MICHEL *et al.*, Appellants, v. J. A. WHITE *et al.*,
Respondents.¹

JUDGMENT—RES JUDICATA—DISMISSAL AND NONSUIT. A judgment in an equity case, after trial, dismissing the action on defendant's motion for the reason that the plaintiffs failed to prove any of the material facts necessary to a recovery, is a judgment on the merits, and a bar to another action, regardless of whether it was called a dismissal or a nonsuit.

JUDGMENT—ENTRY—CLERK'S MINUTES. The clerk's minute entry of a judgment cannot disturb the judgment.

Appeal from a judgment of the superior court for Whitman county, Miller, J., entered March 5, 1910, granting a nonsuit in an action to vacate a deed for fraud, after a hearing before the court. Affirmed.

Frederick W. Dewart, for appellants.

R. L. McCroskey, *J. N. Pickrell*, *U. L. Ettinger*, and *J. M. McCroskey*, for respondents.

¹Reported in 116 Pac. 860.

MORRIS, J.—This action is to set aside a conveyance of real property upon the ground of fraud, and was dismissed in the lower court upon the ground that a former judgment between the same parties, upon the same cause of action, was *res adjudicata*. The former judgment recites the appearance of the respective parties, and proceeds as follows:

“And the cause having proceeded to trial and the plaintiffs having introduced their testimony and having rested, and the defendants and each of them having then moved the court for a judgment dismissing this action on the ground that the plaintiffs failed to prove any material fact essential for their recovery in this action, and the court having heard the argument of counsel on said motion and being fully advised in the premises, finds that the plaintiffs failed to prove any of the material facts necessary for them to prove for recovery under the issues in this case against any of the defendants.

“Wherefore, it is ordered, adjudged and decreed that this case be, and the same is hereby dismissed. And it is further ordered that the defendants recover from the plaintiffs judgment for their costs taxed at \$115.50, and that execution issue therefor.”

The only question submitted by the appeal is the character of the above judgment, appellants contending it is one of nonsuit, while respondents contend it is upon the merits, and a bar. In our opinion, the judgment is one of final dismissal, and a bar to the prosecution of the same cause of action between the same parties. The cause of action pleaded was an equitable one, and when the court found “that the plaintiffs failed to prove any of the material facts necessary for them to prove for recovery under the issues,” it was a finding that there was no equity in the bill, and called for a dismissal of the cause. In all actions of equitable cognizance, two things are considered by the court in its findings and decree: first, is plaintiff entitled to equitable relief; second, if so, an adjudication of what the court considers equity. When the court finds there is no equity in plain-

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tiffs' showing, there is nothing further to be done, and the cause is as effectually at an end as any cause ever can be; and its dismissal upon that ground, unless the court in some way restricts its effect, is final and determinative of that subject-matter, and operates as a bar. *Averill Mach. Co. v. Allbritton*, 51 Wash. 30, 97 Pac. 1082; *State ex rel. Schmidt v. Superior Court*, 62 Wash. 556, 114 Pac. 427.

This court has frequently said that a motion for a nonsuit had no place in equity causes, and whenever we have been called upon to review one, we have treated it as a motion to dismiss. *Cattell v. Fergusson*, 3 Wash. 541, 28 Pac. 750; *Scoland v. Scoland*, 4 Wash. 118, 29 Pac. 930; *O'Neile v. Ternes*, 32 Wash. 528, 73 Pac. 692; *Lilly v. Eklund*, 37 Wash. 532, 79 Pac. 1107. We have likewise held that the statutes relating to nonsuit have no application in equity causes, but that the right of the plaintiff to a voluntary dismissal exists, if at all, as at common law. *Somerville v. Johnson*, 3 Wash. 140, 28 Pac. 373; *Waite v. Wingate*, 4 Wash. 324, 30 Pac. 81. It is, therefore, immaterial whether the motion be called one for a nonsuit or one for a dismissal. Its effect, when granted by the court, is the same.

In *Nunn v. Mather*, 60 Wash. 484, 111 Pac. 566, the same question was incidentally before the court, although not necessarily involved in the determination of the case and consequently not decided; but reference was there made to the finality of a dismissal in an equitable cause, where there is no contrary intention expressed in the judgment. Counsel for appellant suggests the motion as expressed in the clerk's minute entry was for a nonsuit. What we have said disposes of the immateriality of the name given to the motion. Its effect was the same irrespective of its name. In any event, the minute entry could not be used to disturb the judgment. *McGuire v. Bryant Lumber & Shingle Co.*, 53 Wash. 425, 102 Pac. 327.

Having reached this conclusion upon the merits, we do not pass upon a motion to dismiss the appeal.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, CROW, and ELLIS, JJ., concur.

[No. 9458. Department One. July 29, 1911.]

CLARA THOMAS *et al.*, *Appellants*, v. WEST & WHEELER, INCORPORATED, *Respondent*.¹

COVENANTS—WARRANTY—BREACH. An action for breach of covenants of warranty lies where the defendant had previously sold the timber on the land to a third person, and the plaintiff was deceived and had no notice thereof, and did not know that the timber was being removed until it was gone; and it is no defense that the plaintiff was in possession as a *bona fide* purchaser with superior title, since the trespass and taking of the timber were by authority of the defendant; the covenant of warranty being broken on the delivery of the deed.

Appeal from a judgment of the superior court for King county, Ronald, J., entered September 16, 1910, upon granting a nonsuit, in an action for breach of covenant. Reversed.

O. F. Cutts and *James W. Reynolds*, for appellants.

Kerr & McCord, for respondent.

MOUNT, J.—The plaintiffs brought this action to recover damages for the breach of covenant of the warranty in a deed. The case was tried to the court and a jury. The court granted a nonsuit upon defendant's motion, and dismissed the action. Plaintiffs have appealed.

The following facts appear: In March, 1908, the plaintiffs desired to purchase from the defendant a certain tract of land. The terms of sale were agreed upon, and \$20 earnest money was paid. The plaintiffs thereupon exam-

¹Reported in 116 Pac. 1074.

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ined the land, which was a five-acre tract, and were satisfied with it. An abstract of title was afterwards furnished them, showing clear title in the defendant. On the 19th day of May, 1908, the plaintiffs, by their agent, tendered the purchase price, \$750, in full for a deed. The man in charge of defendant's office prepared a deed and the same was executed by the defendant and given to the plaintiffs' agent. This agent, upon reading the deed, discovered that the defendant had reserved the timber on the land, and was told that defendant was reserving the timber on all lands sold in that vicinity. The plaintiffs' agent thereupon stated that the plaintiffs desired the tract of land for a country home which they intended to construct thereon, and that the plaintiffs would not accept a deed with any reservation of timber or other thing, and demanded the return of the earnest money. After a conference among the officers of the defendant, which plaintiffs' agent did not hear, another deed was prepared, executed and delivered to the plaintiffs' agent, and the money was paid. This deed made no reservation of any kind, but warranted title against the claims of all persons.

In August or September, 1908, plaintiffs' agent heard that some persons were removing the timber from the premises and, upon inquiry, learned that, after plaintiffs' deed had been recorded, the timber had been removed from the land by some one acting under authority of a contract made between the defendant and one Osburn, by the terms of which contract defendant had sold to Osburn the timber on the land provided the same was removed within two years. This contract had been made on December 26, 1906, prior to the deed from defendant to plaintiffs. It had never been filed for record, and the plaintiffs had no notice or knowledge of the contract or the sale of the timber. When these facts appeared, the trial court dismissed the action for the reason that plaintiffs were in possession, and defendant was therefore not liable for parties trespassing upon the property.

The defendant argues that the plaintiffs, under the facts

proved, are innocent purchasers, without notice of the prior sale of the timber; that when they took possession of the land under their deed, the contract of sale of the timber to Osburn was void as to them, and gave Osburn, the prior vendee of the timber, no right upon the land; and that when Osburn or his employees went upon the land after plaintiffs' deed had been recorded, they were trespassers for whose acts the defendant was not liable. *Lamb v. Willis*, 125 App. Div. 183, 109 N. Y. Supp. 75, cited by the defendant, is in point and so holds. But notwithstanding this argument and the decision in that case, we are not disposed to follow it. If the trespass had been made by some one not authorized by the defendant, it is apparent that the defendant would not be liable. But the defendant here, by a contract previously entered into, authorized the parties to go upon the land and do what was done. When defendant sold the land with covenants of warranty, the plaintiffs were not informed of the previous sale of the timber and had no notice that there was such a contract, and did not know that the timber was being removed until after it was gone.

It is apparent, we think, that the covenant in the deed was broken at the time the deed was delivered, because the grantor had already sold the timber, and by the deed to plaintiffs sold it again, and thereby authorized two different vendees to take possession of the property. Neither vendee was informed of the fact that the property was sold to another. It is true that the plaintiffs recorded their deed, which thereby became constructive notice to the first vendee, and as between the two vendees, made the unrecorded instrument of Osburn of no effect. But as between the parties to the first contract of sale of the timber, viz., the defendant and Osburn, the contract was valid. The plaintiffs in this action might no doubt have restrained the removal of the timber by Osburn had they known that the same was being or was about to be removed. Yet when the timber was removed by authority of the previous sale without notice to or

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knowledge of the plaintiffs, the act of the parties removing it was in fact the act of the defendant who had authorized it. If the defendant had notified the plaintiffs at the time the deed was delivered that they had already sold the timber, of course, a different rule would apply. But where defendant deceived the plaintiffs, as the evidence shows was done in this case, and thereby led them to believe that there was no other claim to the timber on account of any act of the defendant, it seems that the act of the first vendee should be held to be the act of the defendant.

In the case of *Lamb v. Willis*, *supra*, the court said: "If after conveying to the plaintiff the defendant had sold the timber to Christ, the case would be different." So in this case, if after conveying the land to the plaintiffs, the defendant had sold the timber to Osburn, the defendant would be liable to the plaintiffs for the damage done by Osburn in removing the timber, because in that case the act of the defendant would naturally produce the injury. *Wall v. Osborn*, 12 Wend. 39. In other words, the act of the defendant in selling the same timber to two different persons, without informing either thereof, makes the defendant liable for the acts which naturally follow, because the act of Osburn in removing the timber was authorized by the defendant and was in effect the act of defendant. It can make no difference in reason whether Osburn was authorized to do so by the defendant before or after the deed to the plaintiffs, when no notice was given of the fact. The defendant would have been liable to Osburn for the timber if Osburn had not received it through the defendant's breach of his contract. Defendant is liable to the plaintiffs for a breach of contract for the same reason. Osburn got the timber by trespass, but the trespass and the taking of the timber were by authority of the defendant. We conclude, therefore, that the act of Osburn by authority of defendant was a breach of the warranty of the deed.

The judgment is therefore reversed, and the cause remanded for further proceedings in accord with this opinion.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9541. Department Two. July 29, 1911.]

MICHAEL ROHLINGER *et al.*, *Respondents*, v. COLETTA LAND & ORCHARD COMPANY, *Appellant*.¹

REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE. A contract for the sale of land should be reformed where it was intended that, upon partial payments, parts of the lands might be released at agreed valuations of \$85 per acre for valley land, \$75 per acre for certain overflowed valley land, and \$20 for the balance which was hill land, and a mistake was made in designating the valley land, part of which was omitted from the description of that class.

APPEAL — REVIEW — CORRECT DECISION ON ERRONEOUS GROUND — RIGHT TO ALLEGE ERROR—NECESSITY OF APPEAL. In an equity case, where no findings are made, a decision will be affirmed if correct under the evidence and the whole record upon any ground, although based upon an erroneous proposition of law; and the successful party need not appeal therefrom to secure a correction of the error on affirming the judgment.

VENDOR AND PURCHASER—CONTRACTS—FORFEITURES—RELIEF. The courts cannot relieve from the hardship of defaults provided for in contracts to purchase land, except to grant a period of grace, where warranted by the equities.

Appeal from a judgment of the superior court for Grant county, Steiner, J., entered March 4, 1911, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action to reform a contract. Affirmed.

Brightman & Tennant, for appellant.

McCarthy & Edge, for respondents.

CHADWICK, J.—Appellant is a corporation, organized to take over and promote the sale of certain property in Grant

¹Reported in 116 Pac. 1095.

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county which had been contracted for by defendants Baitinger and Ulrich. The property consisted of ten sections of land, and the purchase price for the whole was calculated at \$25 an acre, or \$160,000. Five thousand dollars was paid upon the execution of the contract, May 28, 1909. The balance was to be paid, \$30,000 on June 3, 1909, \$25,000 on December 3, 1909, and \$25,000 on June 3 and December 3 thereafter, until the full purchase price was paid. Deferred payments drew interest at the rate of six per cent per annum. The payment due June 3, 1909, was paid, but appellant was unable to meet the payment for December 3, 1909, and the time was extended until April 3, 1910. Three thousand seven hundred and fifty dollars was paid in December, but this probably covered interest. It was agreed that any part of the lands might be released after the payment of \$30,000, at certain agreed values—\$85 for certain enumerated tracts, \$75 for a tract of valley land which was subject to overflow, and \$20 for other tracts.

About April 3, 1910, defendants Baitinger and Ulrich went to Milwaukee, and entered into certain negotiations with those interested in the land with respondents (it being admitted that respondent Michael Rohlinger is a trustee), looking to an adjustment of the affair and an extension of time. It is agreed that defendants and appellant were unable to meet the extended payment then due. Although an extension agreement was drawn, it was not executed, and appellant defaulted the payment. However, it tendered, through defendant Baitinger, \$1,200, and demanded a release of all that part of section 33, township 16, north, range 26 E., W. M., lying north of the Chicago, Milwaukee & St. Paul Railway Company's right of way, and demanded a deed therefor. There had been some slight controversy between the parties over the release price of this tract of land, respondent and his associates insisting that a mistake had occurred, and defendants insisting upon the performance of the contract according to its letter. The tender was re-

fused. Thereafter respondents brought this action, setting up the contract and the mistake, and praying that the contract be reformed; that, should the court deem it inequitable for the respondents to declare a forfeiture prior to the reformation, a time be fixed within which defendants might perform, and failing in this, that the contract and all rights thereunder be forfeited. Defendants met this complaint, denying that any mistake had been made, and further alleged a tender, and demanded a specific performance as to the land in section 33.

No more than a general review of the testimony is necessary under our view of the case. It appears that the lands are different in character and, because of that fact, were referred to in the negotiations leading up to the execution of the contract as valley land and upland. The purpose of the parties undoubtedly was to provide for the release of all the valley land at \$85, excepting only the half section subject to overflow, which was to be released at \$75 per acre. In the contract certain sections were described to be released at these figures and "the sum of \$20 for the balance of the land herein described." The land in controversy was not specifically described in the contract, and hence fell within the clause just quoted. The attorney who drew the contract says that it was the understanding that the valley land was to be released only on payment of \$85 per acre. The fact that the valley land was of much greater value than the hill land, this piece in particular, aside from being valley land, having some speculative value over the other tracts of like character because it was situate adjacent to the prospective townsite of Coletta on the Chicago, Milwaukee & Puget Sound railway, indicates to our minds that respondents are correct in their contention. Every reason for stipulating the higher release value is in their favor. No fact or circumstance or conversation indicating a contrary understanding, at or before the time the contract was executed, is

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testified to, defendants and appellant relying upon the letter of the writing.

Three theories are advanced to sustain the decree of the court: anticipatory breach, mistake, and want of equity in appellant's demand. The greater part of the briefs is taken up with a discussion of the law relating to the rights of parties where an anticipatory breach of a contract occurs; appellant insisting that it was upon this doctrine that the court based its decree. That part of the decree pertinent to our discussion is:

"It is further ordered, adjudged and decreed that the plaintiffs are not entitled to a reformation of the contract as prayed for in plaintiffs' complaint, and that plaintiffs are entitled to a forfeiture of said contract unless the defendant Coletta Land & Orchard Company within thirty days from the date of this decree shall pay to the plaintiffs all the several sums of money and all sums due to this date in accordance with the terms of this contract. And it is further ordered, adjudged and decreed that the defendant Coletta Land & Orchard Company is not entitled to the relief prayed for in its cross-complaint."

It is earnestly contended that by this decree the court found that there was no mistake, and hence no right of reformation; that respondent, not having appealed therefrom, is bound thereby, and the only question open for this court is whether there was an anticipatory breach, and it is probably shown that there was not. There are no findings of fact, and whether the trial judge found that there was indeed no mistake, or that, although not fully convinced upon that point, the appellant had not made out such a case on its demand for specific performance as would overcome the showing that was made, is not certain. But we understand the rule of practice to be that, in equity cases tried here *de novo*, the reasoning of the trial court will not control, if from the whole record it is made to appear that a proper decree was rendered.

"The question before us is not whether the lower court ar-

rived at a correct conclusion by an incorrect process of reasoning, but whether, considering all the evidence, its decision was the proper one to be entered." *Kane v. Dawson*, 52 Wash. 411, 100 Pac. 837.

Nor do we think that respondents are to be estopped from asserting the merit of their case because they did not appeal. As we have said, no findings of fact were made to which exceptions might have been entered. An exception to the decree was unnecessary. Rem. & Bal. Code, § 382. The decree was sufficient in form. It granted the prayer of the complaint, that a time be fixed within which all sums due might be paid under the contract upon penalty of forfeiture. Respondents wanted nothing more, and why an appeal should be taken in such a case is not made clearly to appear in argument, nor is it sustained by authority.

"But, without entering into a discussion of these legal propositions, this court has frequently decided, in harmony with universal authority, that in an equity case where all the testimony is here for our inspection, even though the lower court may render a judgment based upon a proposition of law which cannot be sustained, if the judgment is right and can be sustained upon any legal principle, it will not be reversed." *Sanders v. Bartelt*, 24 Wash. 244, 64 Pac. 149.

In this case the rule could not be otherwise, for it can make no difference to respondents upon what ground the court based its decree, so long as a specific performance was denied. They could not be aggrieved thereby. Nor can it make any difference to appellant. A denial of its prayer for specific performance for want of equity is equivalent to a refusal because its demand is not in accord with the true contract of the parties.

Believing that a mistake was clearly shown, and that respondents are entitled to a reformation of the contract to conform to the agreement of the parties, it becomes unnecessary to discuss the law or the facts relied upon to show an anticipatory breach of the contract.

It is earnestly contended that we should consider the

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equities of appellant and its stockholders who must lose the amounts heretofore paid. The hardship of the case is to be deplored, but when men buy on contract, expecting to sell to others in order to cover their obligation, courts cannot relieve their default except to grant a period of grace where the equities of the case warrant it. This has been done, both by the contract of the parties and by the decree of the court, and no reversible error occurring in the record, it is incumbent on us to affirm the decree of the trial court. It is so ordered.

DUNBAR, C. J., MORRIS, ELLIS, and CROW, JJ., concur.

[No. 9620. *En Banc*. July 29, 1911.]

E. F. BLAINE *et al.*, *Appellants*, v. M. L. HAMILTON *et al.*,
Respondents.¹

COUNTIES—INDEBTEDNESS—BONDS—SUBMISSION TO VOTERS—VALIDITY—DISTINCT OR CONNECTED PROPOSITIONS. An election to authorize a bond issue may be submitted to the voters of a county as a single proposition, requiring one affirmative or negative vote, although it is proposed to raise four specified sums for distinct parts of the project—(1) the excavation of a canal from waters to the north of a harbor, (2) the deepening of a river to the south of the harbor, (3) the diversion of the waters of another tributary river, and (4) the erection of wharves and docks in aid or furtherance of the improvement—where it appears that all four parts are related, and in fact one general project for the creation of a great harbor and the utilization and uniting of the waters in and about it.

SAME—SUBMISSION—RESOLUTION. A resolution for the submission of a county bond issue is not illegal as combining several purposes in the conjunctive and disjunctive, from the fact that it recites that the money is to be expended for the specified purposes and other rights and interests necessary to the improvement or of securing the drainage or public interests to be derived therefrom, where the other matters referred to were but details in carrying out the enterprise.

¹Reported in 116 Pac. 1076.

SAME—VALIDATING ACT. A bond issue in a specified sum for deepening the channel of a river "along the lines" laid out by Commercial Waterway District No. 1, and in a specified sum for diverting the waters of a river "along lines" adopted by Commercial Waterway District No. 2, is not invalid as being in aid of such districts, and beyond the authority of Laws 1911, p. 3, which declared such purposes to be county purposes, and validated bonds theretofore authorized within one year next prior to the taking effect of the act, and where the bonds would be authorized if the act be given only such force as it would have had if it had been a law when the bonding question was submitted.

Appeal from a judgment of the superior court for King county, Dykeman, J., entered May 3, 1911, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin a county from issuing bonds. Affirmed.

P. C. Sullivan and Peters & Powell, for appellants.

John F. Murphy, Robert H. Evans, Harold Preston, Walter S. Fulton, and Shorett, McLaren & Shorett, for respondents.

Gose, J.—This is an action to enjoin King county and its officers from issuing its negotiable bonds for \$1,750,000, as authorized by the qualified voters of the county at an election held for that purpose on November 8, 1910. From a judgment for the defendants, the plaintiffs have appealed.

The bonds were authorized in pursuance of a resolution of the board of commissioners of King county, submitting to the qualified voters of the county the question of issuing its bonds in the amount stated, the proceeds thereof to be expended for the following purposes and in the following amounts:

"(1) \$750,000 for the excavation of a channel for the United States Government canal connecting the waters of Salmon Bay with the waters of Lake Washington, known as the Lake Washington Canal.

"(2) \$600,000 for acquiring rights of way for, and in dredging along the same, a straightened, widened and

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deepened channel for the Duwamish river along the lines laid out by Commercial Waterway District No. 1 . . .

“(3) \$50,000 for the purpose of diverting the waters of Cedar River into Lake Washington along lines adopted by Commercial Waterway District No. 2 about to be formed.

“(4) \$350,000 ‘in acquisition for public uses of sites for wharves and docks and of other rights and interest necessary to be acquired in aid or furtherance of said improvement or of securing the drainage or commercial public facilities and benefits to be derived therefrom.’ ”

The resolution was incorporated in the notice of election, and recites, that it is essential to the future growth, development, and prosperity of the county that its one harbor be made into a great and cheap harbor, to the end that it may retain and develop its natural commercial advantages; that the former policy of improving the harbor in parts had not proven advantageous; that the present harbor facilities are inadequate; that the expansion of the harbor can be best accomplished by means of a canal connecting Lakes Union and Washington with the bay, straightening, widening, and deepening the channel of the Duwamish river, and turning the waters of Cedar river into Lake Washington; and that the three matters are so naturally and necessarily related that they are, in fact, a single project consisting of interdependent parts. The resolution further recites that the acquisition of sites for public wharves and docks is essential to the improvement as an entirety. The question was submitted to the people as a single proposition calling for a vote, “King County Harbor Bond Issue—Yes,” and “King County Harbor Bond Issue—No.”

The appellants’ first and principal contention is that several separate, distinct, and independent enterprises were submitted to the people as a unit, compelling them to approve or reject the bond issue as an entirety, and that the election is therefore invalid. The argument is that such a submission permits a meritorious and popular measure to carry or to be borne down by an undesirable one, and that the people

were not given an opportunity to exercise a full, free, and intelligent assent as the general law contemplates and requires. They further assert that the principle declared in the recent case of *Blaine v. Seattle*, 62 Wash. 445, 114 Pac. 164, requires a reversal of the judgment. This position makes a statement of the salient physical facts essential to a correct understanding of this case. The major portion of the city of Seattle, containing four-fifths of the population of King county, lies upon a strip of land a few miles in width, bounded on the west by Elliott bay, on the north by Salmon bay and Lake Union, on the east by Lake Washington, and on the south by the Duwamish river. The Duwamish river is formed by the union of the White, Black, Cedar, and Green rivers, all of which, except Black river, which flows out of Lake Washington, have their source in the Cascade mountains. The Duwamish river empties into Elliott bay to the south of Seattle. The purpose of diverting the waters of Cedar river into the lake is to prevent the deposit of silt in the Duwamish river when Cedar river is at its flood, to drain the Duwamish valley, aid the sanitation of the lakes and their shores, and to aid in the operation of the locks. The rounded project, when completed, will practically belt the city with navigable waters. In the *Blaine* case, there was submitted to the people for a single affirmative or negative vote the proposition of bonding the city for specific sums for sites for fire houses, site for city stables, for the construction of fire houses, for a combined fire house and dock, for a police station, for an isolation hospital, for a bridge on Spokane avenue, and for a bridge on Westlake avenue. This was held to be violative of the constitution, art. 8, § 6, and the general law, in that it combined several nonrelated propositions. Speaking to that subject, we said:

“The vice of this method adopted by the city to compel an affirmative vote on all eight measures is readily apparent upon an examination of the propositions submitted, proposi-

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tions in which there is nothing in common, nor any such unity of interest as would lead any one to either favor or disfavor all eight measures. Illustrating this view is the proposition for the two bridges. One calls for a bridge over the west waterway at Spokane avenue in the south part of the city, a matter in which the people of West Seattle and those interested in the waterways to the south are particularly interested, and which they deem of great value in the opening up of the Duwamish waterway scheme. The other calls for a bridge over the government canal at Westlake avenue in the northern part of the city, a project in which the people along the north end of Lake Union and the advocates of the government canal are deeply interested. There is nothing in common between these two propositions. One is a scheme for the development of the city to the north; the other a scheme for its development to the south. The people in these widely separated districts have no common interest in any local improvement."

And again, we said:

"Neither can they have their bridge unless they take city stables, a sub-police station, an isolation hospital, and other as dissimilar projects with it."

And we quoted with approval from *Stern v. Fargo*, 18 N. D. 289, 122 N. W. 403, 26 L. R. A. (N. S.) 665, as follows:

"The authorities are nearly unanimous to the effect that a proceeding by which two questions are submitted when such questions or their subjects and purposes are not naturally related or connected, is invalid and renders any election at which such questions have been submitted invalid."

A like view was announced in *McBryde v. Montesano*, 7 Wash. 69, 34 Pac. 559. We are, therefore, committed to the view that distinct, unrelated, and independent objects or purposes must be separately submitted by the ballot.

Counsel for the appellants, in his oral argument, stated that the true test of whether a proposition is single is, will it stand alone. This, we think, is but one of the tests of singleness, and might often be no test at all. The true

criterion is, are the several parts of the project so related that united they form in fact but one rounded whole. Either of two converging highways, or either of two public highways terminating upon a highway common to both, would stand alone, but there are few cases which would hold that bonds were invalid where the two were submitted as a single project. Again, we have no doubt that a proposition could be submitted as a unit for bonding the city of Seattle for the construction of one schoolhouse on Capitol hill and another on Queen Anne; or for the construction of isolation hospitals at points remote from each other, if the law permitted bonds for that purpose. Nor do we think a proposition for the construction of a trunk road with laterals could be regarded as double in its nature. The item for wharves and docks is strongly condemned as bearing no relation to the other parts. Suppose the matters had been separately submitted, and bonds for that item had been authorized and the others had failed to carry. The hypothesis, we think, demonstrates the fallacy of the appellants' contention. Experience has shown the wisdom of the public retaining control of such matters. The larger harbor would be incomplete if the public failed to provide aids for its utilization. Wharves and docks are but adjuncts to the harbor. They are but connecting links between the highways of the land and the highways of the sea. They are to sea commerce what a bridge which spans the stream is to land commerce. In the "Report of the Commissioner of Corporations on Transportation by Water in the United States, Part 3, Water Terminals," issued September 26, 1910, speaking of the importance of the public retaining control of terminal facilities, it is said:

"Private control of terminal facilities may seriously impair or practically destroy the real public character of the channels."

And again it is said:

"Control of the terminal facilities either of railroads or water lines means practical control of the routes themselves."

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And again:

"This failure to combine the policy of river and harbor improvements with a comprehensive plan of cooperation for the construction and administration of port terminals has operated to neutralize in considerable degree the value of such channel improvements."

A recent California case, *Clark v. Los Angeles*, 42 Cal. Dec. 25, 116 Pac. 966, is directly in point. It holds, quoting from the syllabus which tersely and correctly interprets the decision:

"The submission to electors of a municipality of a proposition to incur a bonded indebtedness for harbor improvements by the construction of docks, wharves and warehouses, with the streets and waterways necessary or convenient for their use and for access to them from the land on one side and from the water on the other, is but the statement of a single purpose, plan or object."

In *Clark v. Los Angeles*, 41 Cal. Dec. 589, 116 Pac. 722, there was submitted as a single proposition:

"Shall the city of Los Angeles incur a bonded debt of \$3,500,000 for the purpose of acquiring and constructing a certain revenue producing municipal improvement, to wit, works for generating and distributing electricity for the purpose of supplying said city and its inhabitants with light, heat and power, including the acquisition of lands, water rights, rights of way, machinery, apparatus and other property and the construction of electric generating works, substations, transmission and distributing lines, conduits and other works necessary therefor."

The court said that the proposition had but a single object and purpose. In *Kemp v. Hazelhurst*, 80 Miss. 443, 31 South. 908, an election was held valid where the issuance of bonds had been authorized for the erection of waterworks and an electric light plant, submitted and voted upon as a single question. The same view was taken in *Coleman v. Eutaw*, 157 Ala. 327, 47 South. 703. In that case the court said:

"But where the purpose evolved in the blending is the product of two of the purposes enumerated in the act for

which bonds may be issued, and they might naturally and reasonably be deemed or made a part of one of a more general scheme, we are of the opinion that the act does not inhibit the exercise by the governing body of a discretion to blend into one proposition for submission to the voters such enumerated purposes; for instance, we merely suggest, the building of bridges and constructing streets."

State ex rel. Columbia v. Allen, 183 Mo. 283, 82 S. W. 103, is to the same effect. A different view was taken in *Stern v. Fargo*, *supra*. In that case the court said, the question is "Can one naturally be operated without the other." The same court, however, modified this statement in the later case of *Hughes v. Horsky*, 18 N. D. 474, 122 N. W. 799, saying that the *Stern* case held that the issuing of bonds for a waterworks system and an electric light plant involved two purposes not "naturally or necessarily connected"; but that the question of issuing bonds for the purpose of building a court house and jail may be voted upon as one proposition. In *Johnson v. Roddey*, 83 S. C. 462, 65 S. E. 626, an authorization of bonds submitted as one proposition for a waterworks plant and a sewerage system, or either, was held invalid. A similar view was taken by the same court in *Ross v. Lipscomb*, 83 S. C. 136, 65 S. E. 451, 137 Am. St. 794, and in *Chase v. Gilbert*, 83 S. C. 546, 65 S. E. 735. In *Linn v. Omaha*, 76 Neb. 552, 107 N. W. 983, bonds were held valid when authorized by a single vote for the construction of two engine houses to be located in different parts of the city and for the purchase of a site for one of them. In *Oakland v. Thompson*, 151 Cal. 572, 91 Pac. 387, bonds were authorized by a vote of the people for the acquisition of several distinct parcels of land, widely separated, for public parks, submitted and approved as one measure. The court said:

"The scheme is a single scheme, the purpose a single purpose, . . . The law does not contemplate, much less compel, that each piece and parcel of land which may be desired for a park should be voted upon separately. . . .

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Certainly the plan adopted was within the discretionary power of the council under the law, and it enabled every voter to express himself as being for or against the whole proposition. More than this was not required."

In *State ex rel. School Dist. v. Gordon*, 223 Mo. 1, 122 S. W. 1008, it was held that bonds may be authorized by a single vote for building and furnishing a schoolhouse in one ward and for building an addition to and improving a schoolhouse in another ward in the district. The court said that there was an analogy between the constitutional inhibition against doubleness in a bill to be voted on by the lawmaker, and the rule against doubleness in a proposition to be voted on by the people; and that the mischief to be avoided was the same in both cases. In *People ex rel. Mariposa v. Counts*, 89 Cal. 15, 26 Pac. 612, the question presented to and approved by the voters was, shall the board of supervisors of the county be empowered to issue bonds in a sum stated, for the purpose of constructing two public wagon roads in the county, one from Bear Valley to Coulterville, and one from Mariposa to Yosemite, the ballots to be "For the issue of bonds," and "Against the issue of bonds." It was held that the proposition was single.

In *State ex rel. Lowman etc. Printing Co. v. Riplinger*, 30 Wash. 281, 70 Pac. 748, a submission of an amendment of an article of the city charter with five sections, calling for but one affirmative or negative vote, was held valid under a charter provision requiring that, if more than one amendment be submitted, they shall be submitted so that each proposed amendment may be voted upon separately without prejudice to the others. The court said that "it is the unity of subject that is demanded." In *Rock v. Rinehart*, 88 Iowa 37, 55 N. W. 21, it was held that a ballot submitting the question whether a court house, to cost not to exceed a sum stated, should be erected "from the proceeds arising from the sale of lands belonging to the county," contained but a single proposition, although the statute re-

quired an authorization by the people before either of the acts voted upon could be done. The court said there was but one object, "the erection of a courthouse." In *State ex rel. Horsley v. Carbon County* (Utah), 114 Pac. 522, a proposition to issue bonds in a sum stated for the completion and construction of twelve definitely located bridges and five culverts, and for the completing, improving, and repairing of a designated county road, was held to embrace but one "general object."

The following, among other cases, are relied on by the appellants: *Denver v. Hayes*, 28 Colo. 110, 63 Pac. 311; *Leavenworth v. Wilson*, 69 Kan. 74, 76 Pac. 400; *Woodlawn v. Cain*, 135 Ala. 369, 33 South. 149; *Cain v. Smith*, 117 Ga. 902, 44 S. E. 5; *Rea v. La Fayette*, 130 Ga. 771, 61 S. E. 707; *Gray v. Mount*, 45 Iowa 591; *State ex rel. Bethany v. Allen*, 186 Mo. 673, 84 S. W. 531; *State ex rel. Joplin v. Wilder*, 217 Mo. 261, 116 S. W. 1087; *Garrigus v. Board of Com'rs*, 39 Ind. 66; *Lewis v. Com'rs of Bourbon County*, 12 Kan. 186; *Supervisors of Fulton County v. Mississippi etc. R. Co.*, 21 Ill. 338.

In the *Denver* case, eleven propositions, some of them bearing no natural relation to the others, were submitted as a unit. Some of the purposes were public sewers, parks, public squares, viaducts, reservoirs, refunding bonds, and improving the banks and channels of the Platt river. The election was held illegal. In the *Leavenworth* case, it was held that the combining of a proposition for the purchase of waterworks and for the building of a new plant was invalid, saying: "The subject of purchasing a particular plant already in existence is utterly diverse from that of building a new one." In the *Woodlawn* case, a proposition submitted as a unit to authorize a tax levy, for the purposes of paying interest on bonds and of improving and maintaining public improvements, was held to be dual in its nature, and to offend the provision of the constitution requiring that the "purposes" for which the special tax sought

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to be levied shall be stated. In the *Cain* case the legislature enacted a law providing for a new charter for the town of Edgewood, and authorizing it to issue bonds not to exceed \$10,000, the proceeds to be used for the erection of school buildings and purchasing sites for the same, the law to become effective upon its adoption by a two-thirds vote of the qualified electors of the city. The act directed that the ballots contain the words, "for bonds and adoption," and "against bonds and adoption." An election was held, and the required number of affirmative votes were given. It was held that the constitution forbade the submission of the question of the adoption of the charter and the issuing of the bonds as a single proposition, without giving the voters the privilege of adopting or rejecting one or both as their judgment dictated. It was said that the legislature had authority to submit to the voters as a unit the question of the establishment of schools, and the question as to whether the facilities for the schools should be secured by an issue of bonds.

In the *Rea* case, it was held that the question of issuing bonds aggregating \$40,000—\$25,000 for the purpose of establishing and maintaining a system of waterworks, \$10,000 for the purpose of establishing and maintaining a system of electric lights, and \$5,000 for the purpose of improving and extending the public schools of the city and providing adequate accommodations for school patrons and children, could not be combined and submitted to the voters as a single question. The court said that the rule was well settled in other jurisdictions, and upon what it regarded as sound principles, that two or more "separate and distinct" propositions cannot be combined and submitted to the voters as a single question, so as to have one expression of the voter answer all of them. It was further said that the combining of "several distinct and independent propositions" is violative of the spirit of the constitutional provision, that "no law or ordinance shall pass which refers to more than

one subject-matter." In the *Gray* case, there was submitted to the voters of the county the question whether a certain fund should be devoted by the board of supervisors of the county to the erection of a court house at Guthrie Center and a new high school in the town of Penora, in the proportion of two-thirds to the former and one-third to the latter, to be voted upon as a single question. The submission was held invalid, as containing "two objects" and "two purposes." In *State v. Allen*, it was held that propositions to the voters of a municipality for the issuance of bonds for the construction of a public building and for improvements of the waterworks and electric light plants and extension of the water mains and electric lines, cannot be submitted as one proposition to be answered "Yes" or "No." The court said that the submission contained "at least two separate and distinct propositions." In *State v. Wilder*, it was held that a vote authorizing the issuance of bonds for a sanitary sewer in one district and a storm sewer in another district, submitted and adopted as a single proposition, the voter being required to answer "Yes" or "No," was invalid. This case is distinguished in the later case of *State v. Gordon, supra*. In the last three cases cited by the appellants, the adoption by the voters of a proposition in aid of two railroads, submitted as a unit, calling for only an affirmative or negative vote, was held invalid.

While it is true, as appellants contend, that nonrelated projects cannot be made a unit by the resolution of the commissioners or by the evidence of civil engineers, such information may be used to get the relation of the several parts of the proposition to each other and to the plan as a whole. While it is not possible to distinguish some of the cases on the facts, yet in the main it will be noticed that they announce a common principle, viz., that a proposition consisting of related parts can be submitted as a single question, and that unrelated and diverse propositions must be submitted separately. Some of the cases are based upon the

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belief that the method of submission violates the provision of the constitution requiring that every act shall contain but one object which shall be expressed in the title. Others rest upon the belief that the method violates the other section of the constitution requiring the assent of a certain percentage of the voters of the county before bonds can be issued, in that such method does not give opportunity for that full, free, and intelligent assent contemplated by the constitution. Others rest upon the construction of the word "purposes," found in the constitution, statute, charter, or ordinance. Guided by the principles which we have stated, we are constrained to hold that, while the proposition is divided into four parts, taken together they form but one rounded project—the creation of a great harbor, by utilizing, developing, and uniting the waters which nature has so bounteously provided.

The appellants next contend that the appropriation for sites for wharves and docks, the language having been heretofore quoted, is illegal, because it combines several purposes in both the conjunctive and disjunctive. The resolution recites that this sum is to be expended for sites, wharves, docks, and other rights and interests necessary to the full enjoyment of the improvement as an entirety. The authorities cited by the appellants are cases where the entire sum authorized was to be devoted to one of two purposes, or to one of two corporations. The other rights and interests mentioned in the appropriation are but details which may arise in carrying out the enterprise. The amount of the bonds is fixed and definite, and not left to the discretion of the board of commissioners, as in *Schultze v. Township of Manchester*, 61 N. J. L. 513, 40 Atl. 589, and other cases cited by the appellants. Most of the authorities which they cite upon this proposition, which space does not permit us to review, are based upon the express language of the statute. The objection is without merit. *Sioux Falls v. Farmers'*

Loan & Trust Co., 136 Fed. 721; *Clark v. Los Angeles*, *supra*; *Seymour v. Tacoma*, 6 Wash. 138, 32 Pac. 1077; *Griffin v. Tacoma*, 49 Wash. 524, 95 Pac. 1107; *Linn v. Omaha*, 76 Neb. 552, 107 N. W. 983; *State ex rel. Columbia v. Allen*, *supra*; *Strain v. Young*, 25 Wash. 578, 66 Pac. 64.

It is finally urged that the \$600,000 is to be used in aid of Commercial Waterway District No. 1, and the \$50,000 in aid of Commercial Waterway District No. 2, and that such purposes are not authorized by the validating act, Laws 1911, p. 3. The first sum is to be used for acquiring rights of way and widening and deepening the channel of the Duwamish river "along the lines" laid out by Commercial Waterway No. 1. The second sum is to be used for the purpose of diverting the waters of Cedar river into Lake Washington "along lines" adopted by Commercial Waterway No. 2. The fact that the commissioners will follow plans adopted by these districts does not make them aid bonds. The act authorizes the county commissioners of any county of the first class to engage in the several enterprises involved in this suit, or to aid any of the parties named in the act in the prosecution of such enterprises, and declares that "any and every" of such purposes is a county purpose. The act further provides that, where the issuance of bonds has heretofore been authorized within one year next prior to its taking effect, and the vote was such as would have authorized the incurring of the indebtedness and the issuance of the bonds had the act been in force, such authorization is validated and confirmed. The vote authorizing the issuance of the bonds complied with these provisions. We have treated the validating act as having only such force as it would have had had it been a law at the time the bonding question was submitted to the voters. This, we think, is its correct interpretation. Believing that all of the substantial provisions of the act have been complied with, we have not found it necessary to consider or determine whether authority may

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be found elsewhere in the statute for upholding the validity of the bonds.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, ELLIS, MOUNT, CROW, and MORRIS, JJ., concur.

CHADWICK, J., took no part.

[No. 9550. Department Two. August 1, 1911.]

THE CITY OF CHEHALIS, *Appellant*, v. A. S. CORY *et al.*,
Respondents.¹

APPEAL—DECISION—LAW OF CASE. Upon a retrial after remittitur, the decision of the supreme court becomes the law of the case, although the opinion was elaborated upon the denial of a petition for rehearing without an opportunity to be heard thereon.

MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — DEFENSES—ESTOPPEL. Where jurisdiction to levy an assessment was limited to \$6,000, acquiescence therein does not estop the property owners from defending against an assessment for a larger amount.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 29, 1910, foreclosing local assessment liens against certain defendants in amounts tendered by them into court, and against all other defendants at the same rate. Affirmed.

Forney & Ponder and *C. A. Studebaker*, for appellant.

Fletcher & Evans and *S. C. White*, for respondents.

CROW, J.—This action to foreclose a special street assessment has heretofore been in this court. A statement of the issues may be found in our original opinion and opinion on petition for rehearing, *Chehalis v. Cory*, 54 Wash. 190, 102 Pac. 1027, 104 Pac. 768. After remittitur, it was made to appear to the trial court that nearly all of the defendants

¹Reported in 116 Pac. 875.

had severally paid into court, in satisfaction of the liens claimed on their separate tracts, sums of money bearing the same ratio to the assessment levied that \$6,000 bears to \$14,812.50, and that they offered to confess judgment therefor, with costs to be taxed. Thereupon the trial court entered final decree and order of foreclosure against them in the amounts tendered, and also against all other defendants, at the same rate. From this decree, the plaintiff has appealed.

Several assignments of error are presented, by which it is contended that the trial judge erred in rejecting evidence offered and in entering the final decree. The former opinions determined the law of this case, which was clearly expressed in the following language used by this court in denying the petition for rehearing:

"It will be seen that it was the evident intent of the legislature to so frame the law that property which had received the lawful benefit of an improvement should meet the cost thereof in such an amount as, according to the true intent and meaning of the act, would be properly chargeable against it. In the case at bar, the council had jurisdiction to levy an assessment not exceeding \$6,000; beyond this it could not go without notice. But the fact that it did so does not prevent a levy for the full amount of the original estimate; for, by the very terms of the act, the jurisdiction of the council is preserved, to the end that a recovery may be had to the limit of compliance, disregarding all informalities, irregularities, or defects in the proceedings leading up to the final assessment. It is also urged that, if it was the intention of the court to hold that the assessment should be limited to the amount of \$6,000 on the whole district affected, it was not made clear by our former opinion. We had supposed that this followed as a logical deduction from our reasoning. If it does not, it may now be understood that we hold that the assessment made by the city of Chehalis was not avoided by the fact that the cost of the work was \$14,812.50, whereas the cost, as estimated in the original notice, was but \$6,000; that the act of the council in so proceeding was a mere irregularity, and to the extent of the original estimate, or \$6,000, it has full power to levy upon each lot or tract

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affected its proper proportion of the cost according to the true intent and meaning of the law."

Appellant complains that the petition for rehearing was not served upon it, no service being required under the practice; that it had no opportunity to be heard on the questions therein raised; that although the opinion on rehearing denied the petition, it announces principles of law not contained in the original opinion; that no argument or briefs were presented on behalf of the appellant; and that it was never accorded any hearing. The opinion on rehearing only elaborated the one theretofore filed. In any event, appellant has on this appeal advanced its arguments and authorities on the only question it now claims was presented and discussed in the petition for rehearing; that is, whether the authority of the city to levy and collect an assessment for this particular improvement should be limited to its original estimate of \$6,000. Having carefully considered on this appeal all arguments and authority now presented by appellant, our conclusion is that we must adhere to our former rulings as announced in the original opinion, and also in the opinion denying the petition for a rehearing.

Appellant's only remaining contention is, that the trial court erred in rejecting its offer of evidence to show that the respondents should by their actions be equitably estopped from defending against foreclosure of the alleged liens. We find no error in this regard. If the authority of the city to levy and collect the assessment was limited to \$6,000, appellant and its contractor were presumed to have known that fact when they contracted for the improvement, and when appellant attempted to levy the larger assessment. They could not, and did not, rely upon subsequent acts of the respondents, when they entered into the contract, and jurisdiction to make a larger assessment should not be now held to have been conferred upon appellant in the manner urged.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, MORRIS, and CHADWICK, JJ.,
concur.

[No. 9262. Department Two. August 1, 1911.]

O. A. PATTISON, *Respondent*, v. SEATTLE, RENTON &
SOUTHERN RAILWAY COMPANY, *Appellant*.¹

APPEAL—DECISION—LAW OF THE CASE. The decision of the supreme court becomes the law of the case upon a retrial, where all the material questions were raised on the first trial.

DAMAGES—OFFSETS — EXPENDITURES IN TREATMENT — CONTRACT—CONSIDERATION—AVOIDANCE OF RELEASE. Where a release of damages was given to defendant in consideration of an agreement to pay the expense of plaintiff's treatment until he was cured, and plaintiff's injury proves to be permanent and incurable, in an action to recover damages, the defendant cannot offset the sums it had paid out for treatment under its contract to pay for the treatment.

Appeal from a judgment of the superior court for King county, Gay, J., entered August 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a passenger in a collision of street cars. Affirmed.

Morris B. Sachs, for appellant.

Robert A. Devers and *Milo A. Root*, for respondent.

DUNBAR, C. J.—On the 5th day of August, 1906, while plaintiff was upon one of defendant's cars proceeding from Columbia station southerly to Rainier Beach, at or near Dunlap station, the car upon which plaintiff was, collided with another car upon defendant's railway line, and plaintiff was injured. This action was brought by plaintiff to recover damages alleged to have been sustained by him, in the sum of \$5,000, less the sum of \$600 acknowledged to have been paid to plaintiff by the defendant. Defendant by answer alleged affirmatively, that on the 3d day of October, 1906, and prior to the commencement of this action, plaintiff

¹Reported in 116 Pac. 1089.

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made, executed, and delivered to defendant a release, in words and figures following, to wit:

“Know all men by these presents: That O. A. Pattison, of Columbia, in the county of King, and state of Washington, in consideration of the sum of six hundred dollars and treatment till cured of this trouble by C. L. Norbom, medical gymnast, to him paid by Seattle, Renton & Southern Ry. Co., a corporation, duly organized under the laws of the state of Washington, the receipt whereof is hereby acknowledged, do release, acquit and forever discharge the said Seattle, Renton & Southern Ry. Co. of and from all claims and demands, actions and causes of action whatever, for damages, costs, loss of service, expenses and compensation, on account of or in any way growing out of, and hereafter to grow out of accident at Atlantic City on August 5, 1906, and do hereby for my heirs, executors and administrators, covenant with said Seattle, Renton & Southern Ry. Co. forever to indemnify and save harmless the said Seattle, Renton & Southern Ry. Co. against all claims and demands of all persons for damages, costs, expenses, or compensation for, or on account of, or in any way growing out of said accident. (Duly signed and witnessed);”

that, at the time of the making of the delivery of said release, defendant paid to the plaintiff the sum of \$600, and at various times between the 3d day of October, 1906, and the 24th day of March, 1908, the defendant paid to C. L. Norbom the sum of \$771, for treatment of plaintiff by said Norbom as mentioned in said release, and also that the defendant had paid to divers physicians for medical examinations of said plaintiff the sum of \$17.50.

Plaintiff's reply alleges that, immediately after the injury to the plaintiff as set forth in the complaint, defendant sent to plaintiff a physician and the said C. L. Norbom, medical gymnast, and the said physician and medical gymnast examined the plaintiff as to the extent and nature of his injuries, and then and there advised plaintiff that his injury was not of a serious nature and would not prove permanent; that they could and would effect a cure of said injury within six months, and that plaintiff's only loss by reason of such

injury, in case he would sign said agreement, would be a loss of part of his time during the period necessary to effect a cure; that at the time of signing said agreement, plaintiff did not know the extent or nature of his injury, and had no means of knowing the same other than through the statements of said physician and gymnast, and that plaintiff believed the statements of said physician and medical gymnast to be true and, relying upon the same, signed said agreement; that the said statements and representations were not true, and were made for the purpose of inducing the plaintiff to sign said agreement, and the defendant so knew at the time of making such agreement; that after the signing of such agreement, the plaintiff took treatment of said Norbom as directed by the defendant, until said Norbom advised plaintiff that he could not be cured, that his injury would prove permanent, and that any and all treatment that Norbom could give plaintiff would not cure him; that plaintiff thereupon consulted another physician, and upon being advised by him that his injury could not be cured but would prove permanent, plaintiff acted upon the advice of the said Norbom, and such treatment was discontinued; that he has at all times been willing to take treatment from said Norbom, or any treatment provided that would benefit or cure plaintiff of his injury; that he only discontinued taking said treatment upon the advice of said Norbom that it would not relieve said injury. There were other allegations of like import. Upon these pleadings the case went to trial, resulting in a verdict in favor of the plaintiff in the sum of \$750. Judgment was entered for said sum, and appeal followed.

This case was before this court once before, and is reported in 55 Wash. 625, 104 Pac. 825, where the circumstances are stated at length. Upon the close of the evidence in that case, counsel for defendant moved for a nonsuit, which was granted; from which disposition of the case an appeal was taken to this court, the judgment of the lower court was reversed, and the cause sent back for trial. An

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examination of the contentions in that case as shown by the briefs filed, a reference to which has been made in the examination of this case, and of the opinion filed therein, convinces us that all material questions which are raised by appellant in this case were substantially decided in that. Many errors are assigned, mostly going to the refusal of the court to give instructions asked by the appellant, and errors alleged by reason of instructions given to which exceptions were taken by counsel for appellant. The instructions offered were long and involved and full of repetition. The portions of the instructions asked which the court refused to give, we think were properly refused under the prior decision in this case and the law generally; and the instructions given covered the case in its entirety and were as favorable to the interests of the defendant as the law would permit.

It is, however, contended by the appellant that, under a contract of settlement and release, the defendant company was compelled to make the payments to Norbom for his services, and did so only in furtherance of and in carrying out its agreement under the contract. It is confessed that the \$600, paid by the defendant to the plaintiff at the time the release was signed, was, under the instruction of the court, taken into consideration by the jury, and defendant was allowed a credit therefor under the verdict of the jury. But the contention is that anything that the defendant was called upon to pay, and did pay under the terms of the contract, if the contract is to be repudiated, should be credited to defendant; that, as it is admitted that the defendant paid out \$788.50 under the terms of the contract, the defendant should have been credited with that amount; that, being allowed and credit given on the verdict, defendant would be entitled to a judgment against the plaintiff for the sum of \$38.50 as asked for by motion; and that it was error to deny such motion and enter judgment on the verdict of the jury for \$750, or in any other sum.

There seems to us to be no merit in this contention. The

expenditure of \$788.50, while admitted, was not made to respondent, and respondent has never had any benefit of said payment. It was paid to appellant's employee, the medical gymnast, Norbom, and others, for the purpose of carrying out the requirements of its agreement with the respondent; and when it failed to carry out that agreement—for the essence of the agreement was the cure of the plaintiff, and not simply the subjecting of him to treatment at the hands of Norbom—any expense which was incurred in that futile attempt surely ought not to be charged up to the plaintiff. It evidently was not the intention of the jury that the amount of their verdict should be offset by the price of these services by Norbom, for the verdict was: "We, the jury in the above entitled cause, do find for the plaintiff in the sum of \$750 over and above the \$600 already paid to him." Were appellant's contention true, if the respondent had sued for \$1,000 damages and established that claim, and the appellant had shown that in an attempt to carry out its agreement with respondent, which failed without fault on the part of respondent and without any benefit whatever to respondent, it had expended the sum of \$2,000, the result would be, taking the whole transaction into consideration, that the respondent, who was justly entitled to \$1,000 damages, instead of obtaining a judgment for that amount, would find himself with a judgment against him in favor of the appellant for the sum of \$1,000. It seems to us that this contention cannot be sustained in reason.

Finding no reversible error, the judgment is affirmed.

ELLIS, CROW, MORRIS, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 9533. Department One. August 1, 1911.]

BOSTON TOW BOAT COMPANY, *Appellant*, v. SESNON
COMPANY, *Respondent*.¹

CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO SUE—PAYMENT OF LICENSE. Rem. & Bal. Code, § 3715, providing that no corporation shall maintain any suit in this state without alleging and proving that it has paid its annual license fee, applies to a suit by a foreign corporation which had for several years maintained a marine superintendent at a port in this state whose duty it was to attend to the up-keep and maintain crews for three ocean-going steamships owned by plaintiff and entering such port.

PRINCIPAL AND AGENT—RELATION—EVIDENCE. Lighterers who had agreed to collect and pay over freight charges on freight carried by a vessel are not shown to be, in all things, agents of the operators of the vessel, where the contract provided that a local agent of the operators was to make adjustments and payments to the lighterers for lighterage and services.

SET-OFF AND COUNTERCLAIM—ACTION ON ASSIGNED CLAIMS—NOTICE OF ASSIGNMENTS. Under Rem. & Bal. Code, § 266, providing that, in a civil action upon contract assigned to the plaintiff, the defendant may set-off any demand of like nature against the person originally liable if it existed at the time of the assignment and belonged to the defendant in good faith before notice of the assignment, defendants, who, as ship lighterers, had agreed with the charterers of a vessel to collect and turn over all freight charges less compensation for lighterage, may offset an indebtedness to them from the charterers for their failure to deliver coal and grain shipped in their care, in an action for the freights collected, brought by the owners of the vessel upon abandonment of the vessel by the charterers; the lighterers having had no notice that the charterers had abandoned the vessel or agreed to collect and hold in trust for the owners the proceeds of the voyage.

Appeal from a judgment of the superior court for King county, Main, J., entered December 10, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

¹Reported in 116 Pac. 1083.

Piles & Howe and E. C. Hanford, for appellant.

William H. Gorham, for respondent.

DUNBAR, C. J.—The appellant, a Massachusetts corporation, in the year 1907, was the owner of the steamship "Hyades," but had chartered it to Schubach & Hamilton, a Washington corporation, who operated it on the Alaska run out of the port of Seattle. The respondent company was, in the year 1907, operating at the port of Nome, Alaska, as lighterers. In the year 1906, Schubach & Hamilton made a contract with the respondent, the Sesnon Company, whereby it was agreed that the company should collect all freight charges on freight to be carried by the vessel operated by Schubach & Hamilton to Nome, Alaska, and upon the collection of the same should pay over such freight charges to Schubach & Hamilton forthwith. In the month of September, 1907, Schubach & Hamilton, finding that it was unable to comply with the conditions of the charter, executed and delivered to the Boston Tow Boat Company, appellant, an agreement whereby Schubach & Hamilton abandoned the Hyades over to the owner, the Boston Tow Boat Company, Schubach & Hamilton agreeing in said agreement to collect and receive in trust the proceeds of the voyage of the Hyades, then about to be begun.

After the making of that agreement, the Hyades sailed from Seattle to Nome and, upon her arrival at Nome, was lightered by the Sesnon Company, it collecting the amount of freight charges upon the delivery of freight to the various consignees, and turning over to Schubach & Hamilton all freight money collected, less the sum of \$4,269.69. This particular voyage took place between the dates of October 3, 1907, and November 4, 1907, which was after the abandonment of the Hyades by Schubach & Hamilton. The action was brought by the appellant against the Sesnon Company for the amount that had not been turned over by the respondent to Schubach & Hamilton. At the trial in the court be-

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low, respondent paid over to appellant the sum of \$822.89, with interest, leaving the balance now in controversy of \$3,446.80, against which respondent sets up certain counter-claims and offsets on account of claims held by it against Schubach & Hamilton. The aggregate sums are agreed upon between the parties, and there is no dispute concerning items, the respondent admitting the withholding of the amount of \$3,446.80, and in its affirmative answer claiming set-off to that amount. An amendment to the answer was made, putting in issue the question of the right of the plaintiff to bring the action in this state, for the alleged reason that it was a foreign corporation doing business in the state of Washington, and that at the time of the commencement of this action, it had not, and has not since said time, paid its annual license fee to the state of Washington, past due at the time of the commencement of this action.

The court made a finding of fact that, at all times between the 6th day of June, 1908, and the 31st day of October, 1910, both inclusive, the plaintiff was continuously transacting business within the state of Washington, a substantial part of its ordinary business being of a character giving rise to forms of legal obligation; that between said dates it maintained in Seattle, Washington, a representative, in the person of a marine superintendent, whose duties were those of attending to matters relating to the up-keep at Seattle, Washington, of the ocean-going steamships, Hyades, Pleiades, and Lyra, at all of said times owned by the plaintiff, maintaining proper crews and equipments, etc. Upon this finding of fact, it was determined by the court that the plaintiff had not complied with the statute in relation to the payment of its fees, and the cause was dismissed. But in order to settle the whole controversy and prevent another action at some future time, the court also found, in substance, that the defendant had no notice of the abandonment of the Hyades by Schubach & Hamilton, no notice of the contract between Schubach & Hamilton and plaintiff, and no notice that Schu-

bach & Hamilton had agreed to collect and receive in trust or otherwise, for plaintiff, the proceeds of the voyage of the steamship Hyades, or had agreed to pay the same to plaintiff in trust or otherwise, to be disbursed by plaintiff, or for any purpose; that subsequent to the arrival and discharge of said steamship Hyades at Nome, Alaska, and upon her departure from Nome for Seattle upon said third voyage, there was due from defendant to said Schubach & Hamilton under the contract of April 17, 1906, upon an adjustment of collect and prepaid freight charges on said third voyage of the steamship Hyades, a balance of \$4,269.69. It also found, upon the question first discussed here, that plaintiff had not, at the time of the commencement of this action, or at any time since, or at all, paid its annual license fee last due to the state of Washington, and that it had not paid to the state of Washington any annual license fee at all. The court concluded that the defendant was entitled to an offset against Schubach & Hamilton aggregating \$3,446.80, and that whatever interest plaintiff had under said contract of October 1, 1907, in the proceeds of the third voyage of the Hyades, collected by defendant under said contract of April 17, 1906, and by defendant retained, was, as between defendant on the one hand and the plaintiff and said Schubach & Hamilton on the other, the interest of an undisclosed principal. Demurrers were interposed to the affirmative defenses, and overruled by the court.

Noticing first the respondent's contention that the appellant had no right to bring an action for the reasons affirmatively alleged in the answer, § 7 of chapter 140 of the Laws of 1907, p. 271 (Rem. & Bal. Code, § 3715), is as follows:

"No corporation shall be permitted to commence or maintain any suit, action or proceeding in any court of this state, without alleging and proving that it has paid its annual license fee last due."

A somewhat lengthy argument has been presented by the appellant, to the effect that this section, construed in con-

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nection with certain other sections of the statutes, was not intended to apply to a fee of this kind. But this argument is too refined to receive judicial recognition, and the statute pleaded by the respondent is so plain and positive that it would be a wrong to undertake to construe it out of existence, or to modify its plain, mandatory terms. For the purpose of carrying out the intention of the lower court to determine the whole question and avoid future litigation, we have examined the whole record, and from such examination have concluded that the facts found by the court were justified by the testimony, and that such facts warrant the conclusion reached by the court that the respondent was entitled to the set-off which it was allowed. Rem. & Bal. Code, § 266, is as follows:

“The defendant in a civil action upon a contract expressed or implied, may set off any demand of a like nature against the plaintiff in interest, which existed and belonged to him at the time of the commencement of the suit. And in all such actions, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, he may also set off a demand of a like nature existing against the person to whom he was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom he was originally liable, or such assignee while the contract belonged to him.”

It is the contention of the appellant that separate counter-claims and set-offs there pleaded do not show any liability on the part of Schubach & Hamilton on account of the matters set forth, as the various claims are unliquidated; and that, even conceding the liability on the part of Schubach & Hamilton, the pleadings do not show any privity between respondent and appellant, nor any transaction between appellant and Schubach & Hamilton, whereby the liability of Schubach & Hamilton is assumed by appellant or can be trans-

ferred by Schubach & Hamilton to appellant. It is the contention that, under the agreement between Schubach & Hamilton and the respondent, the respondent was agent for Schubach & Hamilton, and that being an agent it could not claim a set-off against its principal. But the contract between the respondent and Schubach & Hamilton shows conclusively that it was not acting at all in the capacity of an agent, but that it was to account to an agent of Schubach & Hamilton. Paragraph 2 of the agreement is as follows:

"Our agent will furnish you a manifest of the cargo which you are to lighter ashore, showing charges thereon and proportion of same accruing to this company. Adjustments to be made between you and our agent at Nome, and he paying you your proportion of all prepaid freight."

Again, paragraph 4:

"Our agent will furnish you with list of passengers and make payments direct to you in accordance with same at agreed rates hereinafter provided."

Paragraph 9:

"When desired by us you are to issue bills of lading on our forms to be furnished by our agent on freight originating at Nome, and adjust settlement of charges on prepaid freight with our Nome agent."

The agreement simply shows that this respondent was under contract with Schubach & Hamilton to perform certain services for it, and these counterclaims were legal counterclaims, being mostly for failure of Schubach & Hamilton to deliver coal, grain, and other commodities to the respondent, which respondent had shipped in the care of Schubach & Hamilton.

Nor is there anything in the contention that this counterclaim was not properly pleaded. The facts were clearly and concisely set forth in the answer showing the liability of Schubach & Hamilton, and this was a sufficient pleading of the counterclaim under the provisions of the code.

Finding no error in the record, the judgment is affirmed.

PARKER, GOSE, MOUNT, and FULLERTON, JJ., concur.

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Statement of Case.

[No. 9420. Department Two. August 1, 1911.]

JOE DUMAS, *Respondent*, v. WALVILLE LUMBER COMPANY,
Appellant.¹

MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT—FALL OF LUMBER—EVIDENCE—SUFFICIENCY. The evidence warrants a finding that the cause of the fall of a pile of lumber was the negligent manner in which it was piled, where there is irreconcilable conflict in the evidence of the two witnesses who saw the pile before the accident, and from the description of one of them the pile was clearly unstable; and in such case it cannot be said that the cause rests in speculation or conjecture.

MASTER AND SERVANT—SAFE PLACE—LUMBER YARD. The duty of a master to furnish a safe place to work applies to working places in a lumber yard where there were piles of lumber impending 12 to 16 feet directly above the working place, and there was but little change in conditions while the men were working before the lumber fell; and such duty is nondelegable.

MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. A laborer in a lumber yard does not, as a matter of law, assume the risks from an unstable pile of lumber, by proceeding, without an inspection, to the place where he was directed to work by the foreman of the yard; whether he acted as a reasonably prudent man being for the jury.

MASTER AND SERVANT—OBEDIENCE TO ORDERS. A direction by a foreman to two men to remove a pile of lumber, one of whom would have to go below, is equivalent to a direct order to the one who did go below.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered October 17, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a lumber yard. Affirmed.

Roberts, Battle, Hulbert & Tennant and Dysart & Ellsbury, for appellant.

Forney & Ponder, for respondent.

¹Reported in 116 Pac. 1091.

ELLIS, J.—The respondent brought this action to recover damages for personal injuries suffered through the falling of a pile of lumber upon him from a dock in appellant's mill yard. From a verdict and judgment in his favor, this appeal was taken.

Appellant's sawmill and lumber yard are so arranged that the lumber is taken from the sorting table on trucks drawn by a horse, and the assorted dimensions placed in piles along the sides of the lumber docks. A space about six feet wide in the middle of the docks is kept clear for a truckway. There are three docks, from 12 to 16 feet high, from 16 to 24 feet wide, and from 350 to over 400 feet in length. The north dock here in question is 18 or 20 feet wide, and at the place of the accident is variously estimated at from 11 to 16 feet in height. No witness had measured it. One Adna Hill was yard foreman, and all the men in the yard and on the docks were under his immediate direction. He had the supervision of the piling of lumber, both in the yard and on the docks. On the ground near to and along the side of the north dock, were timbers 12 inches square, so placed as to form bottoms or bases for permanent stacks of lumber. From time to time as the piles of lumber accumulated along the edge of the dock through the operation of the truckmen, other men working in pairs, also under Hill's direction, would take the lumber from the piles on the dock and stack it on the pile bottoms on the ground below. To do this it was necessary that one man get upon the pile on the edge of the dock and pass the lumber to the other on the ground.

Between two and three weeks prior to the accident, the respondent and one James Woosen, both Lithuanians, who speak little English, were hired by appellant to work in the mill yard. They had known each other many years, and it appears had worked together in various sawmills from time to time for over a year. At the appellant's plant, respondent had no definite line of employment. The foreman, Hill, testified, "he did any work he was directed to do, such as piling

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lumber, loading cars, picking up in the yard, or whatever consisted of yard work." Between 4 and 5 o'clock in the afternoon of March 17, 1910, Dumas and Woosen were taken from a distant part of the premises to the place here in question and directed by the foreman, Hill, to remove a pile of 2x4 lumber from the edge of the dock and stack it on the permanent pile bottom on the ground immediately below. Hill took them along the aisle of the dock between the lumber piles to the pile in question, directed them to stack it below, and went away. Neither of the men had ever worked on this part of the dock before. They proceeded in the usual manner, Woosen getting upon the pile, Dumas went below, and Woosen began passing the lumber over the side of the dock to him, and he placing it in position upon the pile bottom. They had been so engaged but a few minutes, only 20 or 24 pieces of timber having been so passed down and placed, when a part of the pile fell from the dock upon Dumas who was stooping over, and inflicted the injuries complained of.

While there is much conflict in the evidence as to the quantity of lumber that fell, it is not disputed that he was covered by it so that it took several men some three minutes to extricate him. Woosen, who jumped from the pile as it started to fall, testified that all but a small part of the bottom of the pile fell. Witnesses for appellant, who claim that they saw the lumber on the ground, estimate the amount at from 50 to 100 pieces. The negligence charged is that the place where respondent was required to work was unsafe in that the pile of lumber on the dock directly above was so negligently constructed, under the direction of the foreman and presumably with his knowledge, as to make its fall imminent on any added weight. The appellant contends that no negligence was proved, and that the verdict was based upon mere conjecture as to what caused the lumber to fall. The defenses of negligence of fellow servants, contributory negligence, and assumption of risk were also interposed.

There is an irreconcilable conflict in the evidence as to the

dimensions of the pile of lumber and manner of its construction. Woosen, who testified through an interpreter, stated that it consisted of two parts, separated by a space of two inches, the section immediately on the edge of the dock being four or five feet high, the other between the first pile and the truckway being six or seven feet high and supported by 2x4 timbers about eight feet apart standing on end against the first section, extending about two feet above it, and leaning outward toward the edge of the dock. The pieces of lumber in the pile were from eight to twenty-four feet long. He estimated the width of the whole pile at about seven feet. It seems plain that such a pile as he describes would be unstable. The smaller part near the dock's edge would sustain a continual outward pressure from the weight of the other and higher part. The foreman, Hill, testified that the pile was about five feet wide at the bottom, a little more than four feet high, and about two feet wide at the top; that the pile was not in two sections with pieces between; that the timbers were from eight to twenty-four feet long; and that this pile was constructed in the way in which lumber was ordinarily piled along the dock. He was the only witness of appellant who had noticed this pile particularly prior to the accident.

The witness Woosen further testified that, just before the lumber fell, two Japanese truckers brought a truck load of lumber and started to place it on the pile, that he stepped from the lower section where he was standing to the higher and told them not to do so, that the pile was high enough, and at that instant the pile fell, both sections starting to slide at the same time. Hill testified that Woosen, a short time after the accident when questioned as to how it happened, told him that the "Japs ran against the pile with their truck." Woosen denied that he ever so stated, and testified that the Japanese did not run against it. He also stated that most of the few pieces he had removed from the pile he took from the lower section.

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The appellant's argument, based upon this evidence, is summed up as follows:

"The testimony left the cause of the falling of the lumber a mere matter of speculation and conjecture. Under the facts and circumstances, there are so many things that might have caused the lumber to fall that it was a mere matter of guess as to whether it fell by reason of any negligence of the appellant. It was suggested that the Japanese ran against the pile with their truck or that they pushed the pile over. The most likely cause was the piling of more lumber on the pile by the Japs and the manner and way in which Mr. Woosen, the respondent's partner, took the lumber off the pile and the way he stood on the corner of the pile, causing it to slide off. Appellant would not be liable for any of these causes."

In view of the evidence, it seems to us that counsel has confused the ideas of credibility and conjecture. If we are to hold the rule against speculation and conjecture as applicable to this case, then on a mere suggestion, or slight evidence of conflicting theories, it could be successfully invoked in almost any case. The question here presented is really one of credibility of evidence. There was ample evidence, if Woosen is believed, to show that the lumber fell because it was negligently piled; that the pile was so constructed as to be liable to fall upon the application of slight force or added weight. If the lumber was piled as he said it was, there is no room for conjecture, and little cause for wonder that it fell, whether by reason of the addition of his own weight, or of lumber placed thereon by the Japanese, or from the impact of a passing truck. On the other hand, if the pile was constructed as the foreman said it was, it is evident that none of the suggested causes would be sufficient cause. The authorities cited by appellant are not applicable to the evidence before us. In *Hogg v. Standard Lumber Co.*, 52 Wash. 8, 100 Pac. 156, there was no evidence that the logs were negligently loaded or improperly secured on the sled. No specific negligence was proved. The other cases cited on

this point are even less pertinent. In all of them proof of specific negligence was wholly absent.

It is contended that the rule requiring the master to furnish a safe place to work does not apply because "the place to work was being changed constantly." It seems to us that piles of lumber impending some 12 to 16 feet directly above the place where men are required to work makes a situation well illustrating the reason and necessity of the rule. Manifestly there could have been but little change in the pile in the short time appellant and Woosen were at work. There is no evidence that either Woosen or the Japanese or any one else had so changed conditions as to make the place unsafe had the lumber been piled as the foreman, Hill, testified was usual. Nor can the defense of injury by negligence of fellow servants apply. The duty to see that the lumber was piled in such a manner as to make the place reasonably safe was a nonassignable duty of the master. The rule announced by this court in the *Zintek* cases is plainly controlling on the evidence here. *Zintek v. Stimson Mill Co.*, 7 Wash. 178, 32 Pac. 997, 33 Pac. 1055; *Zintek v. Stimson Mill Co.*, 9 Wash. 395, 37 Pac. 340; *Illinois Steel Co. v. Schymanowski*, 162 Ill. 447, 44 N. E. 876; *Libby, McNeill & Libby v. Scherman*, 146 Ill. 540, 34 N. E. 801, 37 Am. St. 191; *Hennessy v. Boston*, 161 Mass. 502, 37 N. E. 668.

No evidence was offered to sustain the defense of contributory negligence other than that more properly applicable to the defense of assumption of risk. While it may be fairly said from the evidence that, if respondent had made an inspection before descending from the dock, he could have discovered that the lumber was insecurely piled, still can it be said that, under the circumstances, he assumed the risk, as a matter of law, by not making the inspection? We think not. If, in proceeding without inspection to his place beneath the dock, to which he was ordered by the foreman, he acted as a reasonably prudent man receiving a like order in the same circumstances would have acted, then it cannot be held, as a

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matter of law, that he assumed the risk. It is true, as appellant contends, that the foreman did not specify which of the two men should go below, but he did take them to the lumber pile on the dock and did tell them to stack it on the pile bottom beneath. He says that this could only be done by one of them getting upon the pile and the other going to the ground below. This was certainly equivalent to an order to the one who did go, and respondent must be held to have acted upon a direct order from the foreman. On these facts, the question of assumption of risk was for the jury, under proper instructions. *Liedke v. Moran Bros. Co.*, 43 Wash. 428, 86 Pac. 646, 117 Am. St. 1058; *De Mase v. Oregon R. & Nav. Co.*, 40 Wash. 108, 82 Pac. 170; *Goldthorpe v. Clark-Nickerson Lum. Co.*, 31 Wash. 467, 71 Pac. 1091; *Dean v. Oregon R. & Nav. Co.*, 38 Wash. 565, 80 Pac. 842; *McGovern v. Central Vermont R. Co.*, 123 N. Y. 280, 25 N. E. 373; *Chesson v. Roper Lum. Co.*, 118 N. C. 59, 23 S. E. 925; *Bunker Hill & S. Min. etc. Co. v. Jones*, 130 Fed 813.

A number of assignments of error are based upon the instructions given by the court. We have examined the instructions with care, but space will not permit us to review them in detail. While they are unnecessarily prolix, we believe that, taken as a whole, they fairly presented the law applicable to the evidence adduced. Some of the instructions are faulty, and standing alone are open to criticism, but when taken in connection with the others we are unable to find that they present ground for reversal. The judgment is affirmed.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9339. Department One. August 1, 1911.]

THE STATE OF WASHINGTON, *on the Relation of J. M.
Grimmer, Respondent, v. THE CITY OF SPOKANE
et al., Appellants.*¹

MUNICIPAL CORPORATIONS—BUILDING PERMITS — APPLICATION—REQUESTS—JURISDICTION—WAIVER OF OBJECTIONS. That an application for a building permit failed to state the kind of animals to be sheltered in the stable, as required by ordinance, and was not accompanied by plans, is not a jurisdictional defect, and is waived, where it appeared that the stable was for horses and no objection was made at the hearing.

SAME—NOTICE OF APPLICATION—WAIVER. A board of public works cannot revoke its permit to erect a stable because of failure to publish notice of the application for two weeks, where the board fixed the notice and had ample opportunity to investigate, and no one else claims insufficient notice.

EVIDENCE — ORAL EVIDENCE — TO VARY RECORD — PROCEEDINGS OF BOARD. Where the record of a board of public works consisted of a written notice stating that it had decided to revoke a permit to build a stable and fixed a date in the future for a hearing thereon, it cannot be contradicted by parol evidence that the board revoked the permit at the time of giving the notice.

MUNICIPAL CORPORATIONS—BUILDING PERMITS—REVOCATION—POWER OF BOARD—PROHIBITION. After a board of public works has heard and granted an application for a building permit, in the manner authorized by ordinance, it cannot, in the absence of fraud, revoke the permit as a mere license, no such power being conferred by the ordinance; and prohibition lies to prevent such revocation.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered November 29, 1909, upon findings in favor of the plaintiff, after a trial on the merits without a jury, in an action granting a writ of prohibition. Affirmed.

F. B. Morrill, Horace Kimball, Burcham & Blair, and A. M. Craven, for appellants, contended, among other things, that the authority having jurisdiction to grant the permit has equal power to revoke it. 21 Am. & Eng. Ency. Law

¹Reported in 116 Pac. 878.

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(2d ed.), p. 126; *Calder v. Kurby*, 5 Gray 597; *Pearson v. Seattle*, 14 Wash. 438, 44 Pac. 884. Such licenses and permits have none of the elements of contractual obligations, and they may be revoked by the same body which has the discretion with reference to their original issuance. *Hirn v. State*, 1 Ohio St. 15; *Lydick v. Korner*, 15 Neb. 500, 20 N. W. 26; *People v. Raims*, 20 Colo. 489, 39 Pac. 341; *Martel v. East St. Louis*, 94 Ill. 67; *Schwuchow v. Chicago*, 68 Ill. 444. In the absence of statute requiring a written record of the proceedings of the board, secondary evidence of their action was competent. 1 Dillon, Municipal Corporations, §§ 300, 301; *Bank of the United States v. Dandbridge*, 12 Wheat, 64; *United States v. Fillebrown*, 7 Pet. 28; *Burrows v. Kinsley*, 27 Wash. 694, 68 Pac. 332; *Nickeus v. Lewis County*, 23 Wash. 125, 62 Pac. 763; *Robertson v. King County*, 20 Wash. 259, 55 Pac. 52; *State ex rel. Porter v. Headlee*, 19 Wash. 477, 53 Pac. 948; *Long v. Pierce County*, 22 Wash. 330, 61 Pac. 142; *Richardson v. Mehler*, 111 Ky. 408, 63 S. W. 957; *Nehrling v. Herold Co.* 112 Wis. 558, 88 N. W. 614. The doctrine of estoppel cannot be applied against the board as to the insufficient notice. *Platter v. Board of Com'rs*, 103 Ind. 360, 2 N. E. 544; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464, 2 N. E. 194; *Rissing v. Fort Wayne*, 137 Ind. 427, 37 N. E. 328; *Harper v. Jonesboro*, 94 Ga. 801, 22 S. E. 139; *Cleveland v. State Bank*, 16 Ohio St. 236, 88 Am. Dec. 445; *Detroit v. Detroit City R. Co.*, 60 Fed. 161.

John M. Gleeson and Joseph F. Morton, for respondent.

PARKER, J.—The relator commenced this action in the superior court for Spokane county, to prohibit the defendants from revoking a permit theretofore granted to him by the board of public works of the city of Spokane to build a stable within the city limits. A trial resulted in a judgment in favor of the relator, and a writ of prohibition was issued

against the defendants accordingly, from which they have appealed to this court.

An ordinance of the city relating to the granting of permits to build stables in the city provides, among other things, as follows:

“Whenever any person shall apply for a permit to build, or to alter or convert any building into a stable, the application shall, in addition to other matters required to be stated in the application, state the number and kind of animals to be sheltered therein, and the plans and specifications shall show the number and location of water pipes for fire protection, and it shall be the duty upon the filing of such application, for the secretary of the board of public works to notify the health officer and the chief of the fire department, in writing, that such permit has to be applied for, stating the name of the applicant, the lot and block number, and the name of the addition or plat or other description of the land upon which the proposed building is to be erected or altered; and thereupon it shall be the duty of the secretary of the board of public works to set a date for hearing before the board of public works, upon said application, which shall not be less than two weeks nor more than four weeks from the date of the filing of such application; and to cause to be posted upon the premises described in such application, a notice of such hearing, giving the time and place thereof and the purpose for which such hearing shall be had.”

Under this ordinance the relator made written application for a permit as follows:

“Board of Public Works, Spokane, Wash., July 31, '09.

“Gentlemen:

“I hereby make application for a permit to erect a stable on lots 2, 3, and 4, block 59, Central Addition. The stable to be occupied by 50 animals. The plans and specifications show the manner in which the water and sewer connections are made, and ——— taps for fire protection.

“To cost \$3,000. Faces Calispell St., west from City Yards. J. M. Grimmer.”

By order of the board the hearing upon this application was fixed for August 16, 1909, at 2 p. m. The health officer

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and chief of the fire department being duly notified that the permit had been applied for, both reported in favor of the granting of the permit. The board caused notice of the hearing of August 16th to be posted on the premises where it was proposed to erect the stable. This posting was done August 5th. The hearing was had before the board on August 16, at 2 p. m., in pursuance of the notice and the order of the board fixing that time for hearing. At that hearing a number of persons appeared and protested against the granting of the permit. On September 1st the board granted the permit and notified the relator accordingly. Thereupon the relator procured lumber and made arrangements for the construction of his stable, and he proceeded so far as to have lumber hauled upon the premises, when on September 27th he received from the board the following notice:

“City of Spokane

“Board of Public Works.

“Spokane, Wash., Sept. 27th, 1909.

“Mr. J. M. Grimmer,

“Spokane, Washington.

“Dear Sir:—At the meeting of the board of public works held this date, it was decided to revoke the permit issued you September 1st, for the erection of a barn on lots 2, 3 and 4, block 59 Central addition. The board has set Monday, October 4th, 1909, at 2 o'clock p. m. for a hearing upon same. Please be present at that time.

“Respectfully,

“Board of Public Works.

“J. T. O'Brien, Secretary.”

No grounds were then assigned for this action of the board. It has at no time been contended that the relator was in the least guilty of any fraud in procuring the permit which would call for forfeiture of his rights thereunder. It is apparent from the record and argument of counsel for appellants that this action was taken by the board solely because it concluded that the permit should not have been granted in the first place.

It is contended on behalf of appellants that the application for the permit failed to confer jurisdiction upon the board to act, in that no statement was made therein as to the kind of animals to be sheltered in the stable as the ordinance provides. We are quite unable to see how appellants can now complain of this defect in the application. The board heard the application and granted the permit after a full hearing upon the merits, and it is plain from the record that in doing so the board fully understood that the application was for a permit to build a stable to shelter horses. The failure to state this fact in the application may have been a defect which would have warranted the board in declining to act upon it or require it to have been made more specific in that regard, but it was not a jurisdictional defect which could not be waived by the board. It is also contended that the application was defective in not having filed therewith plans and specifications for the building. This could be answered in the same way; but possibly a still better answer is to note the fact that the ordinance does not require plans and specifications to be filed with or made part of the application. This application refers to the plans and specifications, and we must presume that the board were shown such plans and specifications as satisfied them.

It is contended that there was want of jurisdiction in the board to grant the permit because there was not given two weeks posted notice of the hearing, the notice being posted August 5th, and the hearing being set for August 16th. Counsel assumed that the ordinance requires that the posting be made two weeks prior to the hearing. The ordinance does not seem to so require in direct terms, and it may be well doubted that such is its meaning. Passing this question, however, the appellants are in no better position to object to the sufficiency of the notice than to make the contentions first above disposed of by us. The board had the benefit of the reports of the health and fire departments before the granting of the permit, had every opportunity for investigation de-

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sired, and set the hearing for August 16th by its own order. No one else is here claiming insufficient notice of the hearing. We think there was no want of jurisdiction such as the rights of the parties to this action can complain of.

When the board of public works took its action of September 27th looking to the revocation of the permit, it then caused no record to be made of that action other than that contained in the notice which it caused to be given to the relator of its purpose to revoke the permit and fixing October 4th for hearing thereon. This notice, which constitutes the sole record then made of its action, we think clearly indicates, though by language somewhat involved, that it intended to give relator a hearing upon the question of the revocation of the permit on October 4. This suit was commenced and an alternative writ of prohibition issued before the date of that proposed hearing. Upon the trial of the cause, appellants attempted to show, by oral evidence, and also by a purported record of the board of public works made up from memory by the members thereof at about the time of the trial, some six weeks after their action evidenced by their notice of September 27th, that they had in fact revoked the permit on September 27, and that the relator had consented thereto. This evidence was excluded upon the objection of the relator. This ruling, the appellants contend, was erroneous. We do not agree with this contention. The offered evidence was in effect an attempt to dispute by oral evidence the record of the board's action on September 27, as evidenced by the notice of that date given to the relator. We think the evidence was not admissible. This does not present the question of proving the action of the board in the absence of a record. It presents the question of proving by oral evidence an action different from that which the board then caused to be evidence in writing. This written evidence, it is true, was not in the nature of formal minutes of the board, but was nevertheless written evidence of what they then did, and we

think cannot be disputed any more than as if it had been in the usual form of minutes.

Some contention is made that this permit in any event amounts to nothing more than a mere license, and that the board having the power to grant it could also revoke it. We find no provision in the ordinance whatever giving the board the power of revocation of a permit of this nature. We are not concerned with the question of what power of that kind might have been given it by the ordinance. It seems to us that when the board heard the relator's application for this building permit upon its merits and thereafter granted it, its power in the premises was exhausted. Any other rule would make a building undertaking of this nature rather a perilous undertaking on the part of the one procuring the permit. We think that, after a fair hearing and the granting of a permit thereon, in the absence of fraud upon the part of the applicant, he has a right to presume that the matter is finally determined, in so far as his rights under the ordinance and the permit granted thereunder are concerned.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, GOSE, and MOUNT, JJ., concur.

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[No. 9354. Department One. August 1, 1911.]

JOSEPH DURANTE, *Respondent*, v. GREAT NORTHERN
RAILWAY COMPANY, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—SUPERIORS—VICE PRINCIPALS. An expert handler of dynamite in sole charge of the blasting work, who negligently caused a premature explosion, is a vice principal and not a fellow servant of an inexperienced boy, engaged for other duties, and who assisted him and was under his control in the work of loading a blast, by express direction of the foreman.

APPEAL—REVIEW—CORRECT DECISION BASED ON ERRONEOUS GROUND. Where errors involving a new trial are expressly waived, and the only question is whether the evidence warrants the judgment, it is immaterial that the decision of the trial court was based upon an erroneous ground, if it was correct upon any theory of the evidence.

Appeal from a judgment of the superior court for Spokane county, Hinkle, J., entered July 2, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee through a premature explosion of dynamite. Affirmed.

L. F. Chester and *William A. Monten*, for appellant.

Roche & Onstine, for respondent.

PARKER, J.—This is an action to recover damages for personal injuries which the plaintiff claims resulted to him from the negligence of the defendant in causing a premature explosion of dynamite while doing excavation work upon its line of railway near the Cascade tunnel. A trial before the court and a jury resulted in a verdict and judgment in favor of the plaintiff. The defendant has appealed, contending that the trial court erred in denying its motions for nonsuit, for an instructed verdict, and for judgment notwithstanding the verdict. Appellant also made a motion for a new trial, but its attorneys have in their brief expressly abandoned that motion, and say that "we do not care for a

¹Reported in 116 Pac. 870.

new trial." We are therefore not concerned with any errors occurring in the cause which could only have that result.

There was competent evidence introduced in behalf of respondent sufficient to warrant the jury in believing the following: On October 19, 1907, appellant was engaged in improving its railway near the Cascade tunnel. In connection with this improvement, excavations were being made requiring a considerable amount of blasting with dynamite. This blasting was in the immediate charge and control of one Corea, who had the handling of the dynamite, prepared the blasts by loading dynamite into holes drilled into the rock for that purpose, and exploded the charges. He was the only man there doing that work. He was experienced in the work and had then been engaged in it for appellant for several months. This work occupied the larger part of his time. At other times he did whatever he was told to do by the foreman.

On October 19, 1907, at the time of the injuries occurring to the respondent, he had been employed for some time by appellant as water boy, a part of his duties being also to attend the brake on a small dump car used in the work. These were his only duties up to that time. He was then only nineteen years old and entirely without experience in the handling or use of dynamite. He only knew in a general way that it was dangerous, and had heard from the men that to cause the dynamite to come in sudden contact with a iron or steel instrument was dangerous as likely to cause an explosion.

A short time before the explosion causing respondent's injuries, he was attending the brake on the dump car not far from where Corea was at work preparing to load a hole with dynamite. Respondent was then called by Corea to come and help him. Respondent refused to go, and, as he says, because that was not his work and he was afraid. After repeating the request three or four times, Corea spoke to the foreman about it, when the foreman told respondent to help Corea, and when respondent again protested against doing

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so, the foreman swore at him and peremptorily ordered him to go and help Corea. He then obeyed. A two-inch hole had been drilled in the rock about 22 feet deep, and under Corea's direction respondent put sticks of dynamite in the hole while Corea pushed them down with a wooden stick such as is usually used for that purpose. It was well known to persons of experience in the work that it was very dangerous to use an iron or steel rod for such purpose, because of the probability of causing an explosion thereby. After several sticks of dynamite had been put into the hole in this manner, Corea attached a cap and a fuse to another stick of dynamite, placed it in the hole, and tried to push it down with the wooden stick, but when about six feet down it stuck and could not be pushed any further with the wooden stick, and then, without any warning, Corea picked up a steel drill, being a long steel rod, and proceeded to use it for pushing the dynamite down, in the place of the wooden stick. As soon as respondent noticed that the steel rod was about to be so used, he started to run away, but the contact of the rod with the dynamite or the cap caused an explosion, resulting in respondent's injuries before he got any distance away. Corea was killed by the explosion. It is not contended that the act of Corea in using the steel rod was other than an act of gross negligence on his part. Indeed, it is admitted in appellant's brief that "It is exceedingly dangerous to use an iron or steel rod in doing this work."

The main contention of counsel for appellant is that Corea and respondent were fellow servants in this work, and hence that the negligence of Corea was not that of the appellant, his employer. It seems to us that this contention is not sound. It is true that it does not appear that Corea was the foreman in charge of the work as a whole, nor does it appear that he had any authority to employ or discharge men; but it does clearly appear that he had charge of this particular work, and that respondent was under his direction and control in handling the dynamite and preparing the blast. Noth-

ing could seem clearer than that the two were not at work there with equal authority, as to the control of one over the other. It is hardly conceivable that this nineteen year old boy, who had no experience in the handling or use of dynamite, was, under the circumstances here shown, assigned to this work with a man of the experience of Corea, who was and had been for months in charge of this work, and was evidently so employed by appellant because of such experience, without at the same time concluding that, as to the particular work they were engaged in, respondent was under the direction and control of Corea. The facts we have above summarized are practically undisputed, and to our mind clearly support the conclusion that the authority of Corea was such as to make him a vice principal and render his negligence the negligence of the appellant. The following decisions of this court support this view: *Allend v. Spokane Falls & N. R. Co.*, 21 Wash. 324, 58 Pac. 244; *Rush v. Spokane Falls & N. R. Co.*, 23 Wash. 501, 63 Pac. 500; *Howe v. Northern Pac. R. Co.*, 30 Wash. 569, 70 Pac. 1100, 60 L. R. A. 949; *Sandquist v. Independent Tel. Co.*, 38 Wash. 313, 80 Pac. 539; *Tills v. Great Northern R. Co.*, 50 Wash. 536, 97 Pac. 737, 20 L. R. A. (N. S.) 434; *Olson v. Erickson*, 53 Wash. 458, 102 Pac. 400.

Counsel for appellant call attention to, and rely upon, the following decisions from this court: *Wilson v. Northern Pac. R. Co.*, 31 Wash. 67, 71 Pac. 713; *Jock v. Columbia & Puget Sound R. Co.*, 53 Wash. 437, 102 Pac. 405; *Desjardins v. St. Paul & Tacoma Lumber Co.*, 54 Wash. 278, 102 Pac. 1034; *Magnuson v. Chicago, Milwaukee etc. R. Co.*, 58 Wash. 141, 107 Pac. 1043. But we think a reading of these decisions will show that in none of them was there any such authority and control on the part of the employee whose negligence caused the injury over the employee injured as is shown in this case. In the *Desjardins* case the negligent employee and the injured employee were both millwrights, and both skilled in the work in hand. It is true that the

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negligent employee had some superiority of position, but we think he had no such control as Corea had over this respondent. In the other case relied upon we are unable to discover any material difference in authority between that of the injured employee and that of the employee whose negligence caused the injury. The holdings in those cases that the employees concerned were fellow servants we think does not militate against our holding here that Corea was a vice principal.

Counsel for appellant contended, in substance, in their reply brief that it was the theory of counsel for respondent, and so understood by the trial court, in the trial of the cause, that Corea was a vice principal solely because the handling of the dynamite by him was a nondelegable duty, and that counsel for respondent did not rely upon Corea's authority of superintendence and control as a ground of his vice principalship. It is now insisted that counsel for respondent should not be permitted to change their theory and rely upon the latter ground as well as the former. It is true that the trial court seems to have instructed the jury upon the theory first mentioned, and practically ignored the second. But it is not entirely clear from the record that respondent has not at all times also relied upon both grounds to show Corea's vice principalship. This matter might be of some concern here if we were only considering questions of error calling for a new trial. We have noticed that counsel for appellant have expressly waived all such errors and given us to understand that they did not want a new trial. Our concern here is to see whether or not the evidence as a whole warrants the conclusion that Corea was a vice principal. We think we are not called upon to confine respondent's counsel to any particular theory claimed by appellant's counsel to have been adopted upon the trial of the cause. Since the evidence supports the argument here made in respondent's behalf, based upon the theory of superintendence and control to show Corea's vice principalship, we do not feel warranted in ex-

cluding such theory simply because the trial court may have committed error in its instructions to the jury upon the theory of nondelegable duty, even though the trial court may have thereby indicated that no other theory of Corea's vice principalship was involved in the case. It is quite immaterial, under these circumstances, how the court instructed the jury. Such instructions might or might not result in a new trial, but would not determine the question of whether or not the evidence supports the verdict and judgment.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 9441. Department One. August 1, 1911.]

N. C. BARDSLEY, *as Guardian etc., Appellant*, v. LUCINDA A. TRUAX *et al., Respondents*.¹

WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. In an action by the heir of a deceased grantor in a deed of gift, testimony of the grantee that he had possession of the deed very soon after its date and had kept it in his trunk ever since, is not inadmissible as evidence of a transaction had with the deceased, within Rem. & Bal. Code, § 1211, excluding such testimony.

ESTOPPEL—ADMISSIONS—PREJUDICES. A party is not estopped to deny admissions sought to be proven against him, when the statements were not admitted and he claimed that he had signed a paper without reading it or knowing its contents, relying upon another to read it to him, and no one was misled thereby to their disadvantage.

Appeal from a judgment of the superior court for Stevens county, Kellogg, J., entered November 9, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to cancel deeds. Affirmed.

¹Reported in 116 Pac. 1075.

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Belden & Losey, for appellant.*E. D. Germain and Jackson & Bailey*, for respondents.

PARKER, J.—The plaintiff commenced this action to set aside two deeds of gift, upon the ground that they have never been delivered. A trial before the court resulted in a judgment in favor of the defendants, from which the plaintiff has appealed. The deeds involved were duly signed and acknowledged by Charles E. Truax on January 26, 1903, and by their terms purported to convey to each of the respondents an undivided one-half interest in land in Stevens county. The respondent Lucinda A. Truax was then the second wife of Charles E. Truax; the respondent Leslie A. Truax is his son; and Lena Lavicy Gustine is his grandchild, being the daughter of his deceased daughter, and therefore one of his heirs. Charles E. Truax died May 1, 1906. We will assume that the land involved was his separate property at the time of executing the deeds on January 26, 1903.

The principal contention of counsel for appellant is that the deeds were never delivered to respondents. This contention involves questions of fact only. The evidence produced in behalf of appellant relates to certain alleged admissions of respondents touching the retention of the possession of the deeds by Charles E. Truax during his lifetime. No other evidence was produced in behalf of appellant in support of his allegation of nondelivery of the deeds. These alleged admissions are positively denied by both respondents in their testimony. There was testimony of several witnesses which, if believed, would leave no doubt that each of the respondents has had possession of their respective deeds ever since about January 26, 1903, the date they bear, and that they have also had possession and control of the land since then, managing the same as their own and collecting the earnings thereof. We think the evidence clearly preponderates in favor of the trial court's view that the deeds were delivered at about the date they bear.

Respondent Leslie A. Truax was permitted by the court to testify, over the objection of appellant's attorney, that he had the deed in which he was named as grantee in his possession very soon after the date thereof, and that he thereafter kept it in his trunk among his private effects. This testimony is claimed to have been erroneously admitted, in violation of Rem. & Bal. Code, § 1211, providing that:

"In an action or proceeding where the adverse party sues or defends . . . as deriving right or title by, through, or from any deceased person, . . . then a party in interest or to the record shall not be admitted to testify in his own behalf as to any transaction had by him with, or any statement made to him by any such deceased . . . person"

This was not testimony as to any transaction had with the deceased, nor as to any statement made by the deceased. We think it was admissible. The decisions of this court are in harmony with this view. *Ah How v. Furth*, 13 Wash. 550, 43 Pac. 639; *Marvin v. Yates*, 26 Wash. 50, 66 Pac. 131; *Kauffman v. Baillie*, 46 Wash. 248, 89 Pac. 548. Testimony of respondent Lucinda A. Truax of the same nature was admitted. This was not error for the same reason.

Counsel for appellant contends that the "lower court erred in admitting the evidence which tends to disprove and rebut the admissions of the respondents, contained in the affidavit of Leslie A. Truax and in the verbal admissions of Lucinda A. Truax, because by their words and conduct both of the respondents were estopped to set up any defense or to introduce any testimony which was contradictory of the above mentioned admissions." It would be a strange doctrine that would prevent a party from offering evidence to show that he had not made admissions sought to be proven against him. This is quite another thing than precluding one from denying the truth of statements admitted to have been made by him, where some element of estoppel is involved. The written statement made by Leslie A. Truax purported to contain, among other things, the admission relied upon against him. His

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testimony was to the effect that he did not make the statement and did not know it was contained in the writing he signed; that he did not read the writing when he signed it, but depended upon another person to read it to him, who had written his statements down in narrative form from questions and answers then propounded to and answered by him. It is clear there is no element of estoppel here involved. No one was mislead thereby to their disadvantage. The condition of the parties as to their respective rights here involved have not changed a particle, nor was it intended that the statements contained in the writing should have any such effect. This purported admission was not different from any other evidence, and was subject to be controverted as any other evidence. 16 Cyc. 1045; 2 Wigmore, Evidence, §§ 1055, 1056. What we have said applies with even greater force to the purported admission of respondent Lucinda A. Truax, since the admission attributed to her was only oral.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, and MOUNT, JJ., concur.

GOSE, J., concurs in the result.

[No. 9457. Department One. August 1, 1911.]

JAMES M. GLOVER, *Respondent*, v. RICHARDSON & ELMER COMPANY, *Appellant*.¹

MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTORS—EVIDENCE—QUESTION FOR JURY. Whether a teamster, employed by defendant with his team and wagon by the month to haul lumber and assist in other work, subject at all times to the control of defendant's foreman, is the servant of the defendant or an independent contractor, rendering defendant liable for his negligent injury of a third person in the course of the employment, is a question for the jury.

MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE IN LOADING WAGON—EVIDENCE—SUFFICIENCY. There is sufficient evidence

¹Reported in 116 Pac. 861.

of negligence in overloading a wagon, one of the rear wheels of which collapsed in a street and injured a person in the street, where it appears that it was loaded with flooring, estimated to weigh about 2,700 lbs., which protruded back eight feet, throwing the principal weight on the rear wheels, the wagon being built to carry two tons.

MASTER AND SERVANT—INJURY TO THIRD PERSON—LIABILITY OF MASTER. One who hires a teamster with his team and wagon is as much responsible for the safety of the wagon as though he hired a man to drive his own wagon, so far as third persons are concerned.

Appeal from a judgment of the superior court for King county, Ronald, J., entered November 4, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained through the collapse of a wagon hired by the defendant. Affirmed.

McClure & McClure and Edwin C. Ewing, for appellant, contended, among other things, that the admitted facts made the driver an independent contractor, and required a directed verdict for the defendant. *Burns v. Michigan Paint Co.*, 152 Mich. 613, 116 N. W. 182, 16 L. R. A. (N. S.) 816; *De Forrest v. Wright*, 2 Mich. 368; *Jahn's Adm'r v. McKnight & Co.*, 117 Ky. 655, 78 S. W. 862; *Kueckel v. Ryder*, 54 App. Div. 252, 66 N. Y. Supp. 522; *Bryson v. Philadelphia Brewing Co.*, 209 Pa. 40, 57 Atl. 1105; *Wood v. Cobb*, 13 Allen 58; *Chicago Hydraulic Press Brick Co. v. Campbell*, 116 Ill. App. 322; *Foster v. Wadsworth-Howland Co.*, 116 Ill. 514, 48 N. E. 163. Where one renders service for another in the course of an occupation, representing the will of his employer only as to the result, and not as to the means by which it is accomplished, he is an independent contractor. *Boyle v. Great Northern R. Co.*, 13 Wash. 383, 43 Pac. 344; *Ziebell v. Eclipse Lumber Co.*, 33 Wash. 591, 74 Pac. 680; *Engler v. Seattle*, 40 Wash. 72, 82 Pac. 136; *Larson v. American Bridge Co.*, 4 Wash. 224, 82 Pac. 294, 111 Am. St. 904; *Miller v. Moran Bros. Co.*, 39 Wash. 631, 81 Pac. 1089, 1 L. R. A. (N. S.) 283; *Harrison v. Collins*, 86 Pa. St. 153, 27 Am. Rep. 699; *Carter v. Berlin Mills Co.*,

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58 N. H. 52, 42 Am. Rep. 572; *Fink v. Missouri Furnace Co.*, 82 Mo. 276, 52 Am. Rep. 376; *Wabash, St. L. & P. R. Co. v. Farver*, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; *Karl v. Juniata County*, 206 Pa. 633, 56 Atl. 78; *Knowlton v. Holt*, 67 N. H. 155, 30 Atl. 346. The general rule is that where there is no substantial contradiction in the evidence, it is the duty of the court to take the case from the jury and render judgment as the facts require. *Wadhams v. Page*, 6 Wash. 103, 32 Pac. 1068; *Squires v. Zumwalt*, 12 Wash. 241, 40 Pac. 986; *Underwood v. Stack*, 15 Wash. 497, 46 Pac. 1031; *Creagh v. Equitable Life Assur. Society*, 19 Wash. 108, 52 Pac. 526; *Pacific Nat. Bank v. Aetna Indemnity Co.*, 33 Wash. 428, 74 Pac. 590; *Meyers v. Syndicate Heat & Power Co.*, 47 Wash. 48, 91 Pac. 549; *Johnson v. Great Northern Lumber Co.*, 48 Wash. 325, 93 Pac. 516.

Brightman & Tennant, for respondent.

FULLERTON, J.—On July 5, 1910, the respondent, then in the employment of the Seattle-Tacoma Power Company as a lineman, was working in an alley in the city of Seattle, stringing new light lines to take the place of old ones that had been broken and torn down during the time of a fire occurring a few days before. Some days before, a tool box containing working tools and fixtures had been brought into the alley and deposited by the side of the way. During the course of the day named, the respondent was searching for some tool or fixture in the box, when a team hitched to a wagon loaded with lumber was driven into the alley by one A. J. Taylor. As the wagon passed the place where the respondent was at work the hind wheel on the side on which the respondent was working suddenly gave way, causing the load to fall against the respondent, pinning him to the ground and severely injuring him. He thereupon brought the present action, alleging that the team and wagon belonged to the appellant; that it was driven by appellant's servant in the

transaction of the business of appellant; that the wagon was weak, defective and overloaded, and broke and collapsed because thereof.

The appellant answered by a general denial, and certain affirmative pleas not necessary to especially notice. The trial developed the fact that the team and wagon was owned by Taylor, the driver; that the appellant was engaged in the business of manufacturing and selling sashes, doors, and finishing lumber, and had employed Taylor with his wagon and team early in the year to do their hauling, paying him therefor a wage of \$140 per month for a certain period and \$150 per month thereafter. Taylor's duties consisted of hauling rough lumber from the depots and wharves to the appellant's factory, and finished products therefrom to the consumers. The wagon bore on its sides signs on which were painted the name of the appellant, its business address, and the words, "Sash, Doors, Finishing." Taylor was subject at all times to the directions of the appellant's foreman, and was assisted by other employees of the appellant in loading and unloading when at the factory. When there was no hauling to do, which event seems to have occurred only occasionally, he assisted other workmen in their duties around the factory. Taylor was expected to work nine hours a day, to feed and care for his own team, keep his wagon in repair, and was at liberty to determine the size of his load, and choose his own route in going and coming from places between which he was directed to haul.

As to the cause of the collapse of the wheel, it was shown on the part of the respondent that the wagon was loaded in such a way as to cause the principal part of the weight to fall on the hind wheels; that the place where the wheel gave way was comparatively smooth, and that there was no other cause for the wheel giving way than excessive weight on the wagon. On the other side, it was shown that the wagon was loaded with flooring at the time it collapsed, which was estimated to weigh less than 2,700 pounds; that the wagon was

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intended to carry with safety a load up to two tons; and that the wheel that collapsed had been examined by a wagon maker not many weeks prior to the accident, and pronounced in good repair. The wheel, after its collapse, showed fresh breaks and no concealed defects.

At the conclusion of the case, the appellant challenged the sufficiency of the evidence to justify a verdict for the respondent; arguing, first, that the evidence showed Taylor to be an independent contractor; and second, that the evidence failed to show negligence on the part of Taylor. The court denied the challenge, but submitted both questions to the jury, which found a verdict for the respondent. Judgment was entered thereon, and this appeal followed.

The appellant renews its objections in this court, insisting that the trial court erred in refusing to take the case from the jury on one or both of the grounds suggested. It has seemed to us, however, that the ruling of the trial court was right. Whether a person performing work for another is performing it as an independent contractor or as the servant or employee of that other is a question not always easy of solution, but all of the authorities agree that the test of the relationship is the right of control on the part of the employer. Thus in 26 Cyc. 1546, an independent contractor is defined as follows:

“An independent contractor is one who, carrying on an independent business, contracts to do a piece of work according to his own methods, and without being subject to the control of his employer as to the means by which the result is to be accomplished, but only as to the result of the work. Generally the circumstances which go to show one to be an independent contractor, while separately they may not be conclusive, are the independent nature of his business, the existence of a contract for the performance of a specified piece of work, the agreement to pay a fixed price for the work, the employment of assistants by the employee who are under his control, the furnishing by him of the necessary materials, and his right to control the work while it is in progress except as to results.”

Shearman & Redfield in their work on Negligence offer this definition:

"The true test of a 'contractor' would seem to be, that he renders the service in the course of an independent occupation, representing the will of his employer only as to the *result* of his work, and not as to the means by which it is accomplished." 1 Shearman & Redfield on Negligence (5th ed.), § 164.

In 16 Am. & Eng. Ency. Law (2d ed.), p. 187, this definition is given:

"Generally speaking, an independent contractor is one who, in rendering services, exercises an independent employment or occupation, and represents his employer only as to the results of his work, and not as to the means whereby it is to be accomplished. The word 'results,' however, is used in this connection in the sense of a production or product of some sort, and not of a service."

And this court in *Larson v. American Bridge Co.*, 40 Wash. 224, 82 Pac. 294, 111 Am. St. 904, said:

"The general test which determines the relation of independent contractor is that he shall exercise an independent employment, and represent his employer only as to the results of his work and not as to the means whereby it is to be accomplished. The chief consideration is that the employer has no right of control as to the mode of doing the work; but a reservation by the employer of the right to supervise the work, for the purpose of merely determining whether it is being done in accordance with the contract, does not affect the independence of the relation."

In the case at bar, it would seem that the employee was not entirely free from control as to the manner of doing the work. On the contrary, he was subject at all times to the direction of the appellant's foreman as to what particular thing he should haul, when it should be hauled, and as to the place the thing should be taken. He was paid by the month and not by the job, and was at liberty to haul for no one else. These facts, it seems to us, raise sufficient doubt as to the capacity in which Taylor was employed to make the question one of

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fact for the jury, rather than a question of law for the court.

The second proposition, that there was not sufficient evidence of negligence on the part of Taylor to make a case for the jury, we think is also not well taken. The jury were warranted in finding that the wagon was overloaded, when the manner of its loading was taken into consideration. The evidence tended to show that the lumber protruded back of the wagon from eight to ten feet, which had a tendency to throw the principal weight upon the hind wheels. It might well be that a wagon capable of carrying two tons, if evenly distributed over all four of its wheels, would not carry the weight of this lumber, if the weight rested principally on only two of its wheels.

Counsel for appellant make this further observation, namely:

"There is still one more suggestion we have to make to the court, and that is that even if Taylor could have been held to be the servant of appellant for the purpose of making deliveries of goods, it was Taylor who was hired, not his wagon. If appellant can be held liable to the respondent for the injuries caused by the breaking of the wagon, why may not Taylor hold the appellant liable for the damage he received caused by the repairs he had to make. On respondent's theory of his case, the wagon was appellant's wagon, in charge of appellant's servant, and engaged in appellant's business, and was broken by appellant's negligence. Upon this theory the case was sent to the jury. But Taylor cannot recover from appellant; he is precluded from such recovery by the very terms of his contract with appellant. We fail to see how respondent can stand in any better position before the court than Taylor would if Taylor brought suit for the recovery of the cost of the repairs to the wagon."

If the appellant employed Taylor to enter its service with his team and wagon, it is just as much responsible for Taylor's acts with relation to the team and wagon as it would have been had it hired Taylor alone and put him to driving a team and wagon which it owned in its own right or hired from some other person. By hiring the wagon the appellant

made it its own as to third persons, notwithstanding as between itself and Taylor the wagon belonged to Taylor. Having this responsibility with reference to the wagon, it was, of course, liable if its servant overloaded it and thereby caused an injury to a third person. This rule does not permit Taylor to recover from the appellant for the injury that was done to the wagon. On the contrary, the fault causing the injury was the fault of Taylor, and the appellant is responsible for it not because it committed the wrong, but on the doctrine of *respondeat superior*, the rule of law that renders masters liable to third persons for wrongs committed by their servants while the servants are engaged in the performance of their master's business. Indeed, so far from the appellant being liable for the injury to the wagon, Taylor is liable over to the appellant for any damage the appellant may be compelled to pay on account of the injury caused by the collapse of the wagon. *Doremus v. Root*, 23 Wash..710, 63 Pac. 572, 54 L. R. A. 649.

The judgment appealed from is affirmed.

DUNBAR, C. J., PARKER, and MOUNT, JJ., concur.

[No. 9472. Department Two. August 3, 1911.]

H. R. BAYLIS *et al.*, Appellants, v. H. S. KERRICK *et al.*,
Respondents.¹

TAXATION—TAX TITLES—ACTIONS TO VACATE—LIMITATION OF ACTIONS. An action to cancel a tax deed is barred within three years by Rem. & Bal. Code, § 162, although the tax judgment on which it was based was void for want of jurisdiction.

ALTERATION OF INSTRUMENTS—ERASURES—PRESUMPTIONS. An erasure or alteration in a tax deed will be presumed to have been made by the public officer in performance of his duties before execution and delivery of the deed, in the absence of any explanation.

¹Reported in 116 Pac. 1082.

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Opinion Per CROW, J.

Appeal from a judgment of the superior court for Island county, Still, J., entered July 14, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title. Affirmed.

Charles R. Crouch, for appellants.

James Zylstra, for respondents.

CROW, J.—This action was commenced on January 24, 1910, by H. R. Baylis and wife against H. S. Kerrick and wife, to quiet title to forty acres of land in Island county. The defendants denied plaintiffs' alleged title and ownership, and for affirmative answer alleged, that on April 19, 1902, the treasurer of Island county executed and delivered to Island county a tax deed regular in form for the forty acres and other lands, in pursuance of general tax foreclosure proceedings; that on February 25, 1903, Island county, by its treasurer, sold and conveyed the forty acres to defendant H. S. Kerrick, who has since been owner of the fee simple title, entitled to possession, and has paid all taxes for the years 1903 to 1908, inclusive; that prior to the commencement of this action, plaintiffs had notice of defendants' claim and title; that their action is in effect one to set aside and cancel a tax deed; and that it was not commenced within the time limited by law. From a judgment of dismissal, the plaintiffs have appealed.

The trial judge entered the order of dismissal on the sole theory that this is an action to set aside and cancel a tax deed, and is barred by the statute of limitations, Rem. & Bal. Code, § 162. Appellants contend the foreclosure upon which the tax sale and deed are predicated is absolutely void as to the land here involved, in that its description was not included in the summons, the claim for judgment, or the judgment itself. The tax deed is regular in form, describes the land, was executed some eight years prior to the commencement of

this action, was recorded two days after its execution, and purports to convey to the county a tax title for the forty-acre tract and other lands. No substantial dispute is made upon the facts. The vital question presented is whether at any time after the statute has run as against the tax deed, a former owner may indirectly attack and avoid the deed by questioning the regularity and validity of the foreclosure proceedings, the deed itself being regular in form. This question has been determined in respondents' favor by this court in *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850, where we said:

"The point is made that the published summons and the affidavit upon which it is based are so defective that the court did not acquire jurisdiction, and that the judgment is therefore void, and that a tax deed based upon a void judgment is not within the protection of the statute. This is no longer an open question in this state. A like question was made in *Hamilton v. Witner*, 50 Wash. 689, 97 Pac. 1084, 126 Am. St. 921, and in *Lara v. Sandell*, 52 Wash. 53, 100 Pac. 166. In the *Lara* case we said: 'Whatever the rule may be in other jurisdictions, it is firmly established in this state that a void tax deed may constitute a sufficient basis for the running of the statute of limitations.' In these cases the court was considering the seven-year statute of limitations, but we do not conceive that a different principle should obtain in applying the provisions of the act of 1907, which is special to tax deeds and general in its terms. Its purpose was to foreclose investigation as to the validity of the proceedings leading up to the judgment unless challenged within the time limited by the act. The precise question was raised in *Cordiner v. Dear*, 55 Wash. 479, 104 Pac. 780. Whilst this question was not discussed in the opinion, it was assumed that the law was settled in this jurisdiction adversely to the appellant's contention. The act of 1907 would serve no purpose if limited to deeds executed on sales regularly made upon valid judgments only. Such deeds need no legislative aid."

Some contention is made to the effect that an erasure appears on the face of the original deed executed and delivered by the treasurer to Island county. No evidence explanatory

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of the alleged erasure was offered. The deed was recorded on April 21, 1902, two days after its execution. No erasure appears on the official record. No fraud has been suggested, nor has the deed or its record been attacked at any time prior to the commencement of this action. The original instrument is before us as an exhibit. All of its written portions, including figures written over the alleged erasure, appear to be in the same ink and handwriting. It was executed and delivered by a public officer in discharge of his official duties. In the absence of evidence to the contrary, it will be presumed the alteration, if any, was made by him before execution and delivery, to correct some mistake. A public officer, having no personal interest in the transaction or the instrument in question, will be presumed to have acted lawfully in the proper discharge of his duty. 2 Cyc. 242; *Northwestern Mortgage Trust Co. v. Levtzow*, 23 S. D. 562, 122 N. W. 600.

Appellants argue that, if the respondents are permitted to prevail herein, a treasurer might issue a tax deed without the entry of any foreclosure decree; that it would be within his power to fraudulently deprive an innocent party of title to his real estate should the three-year statute run before the true owner learned of the existence of the tax deed, which the grantee named therein might withhold from the records. We have no such chain of circumstances before us. It is conceded the appellants failed to pay taxes on their land for many years prior to the commencement of this action, although they did pay taxes for 1909, before the respondents could do so. They knew the law, and must have been aware of the fact that nonpayment for such a length of time would cause a loss of their land by tax foreclosure and sale. By their present contentions they seek to avoid the effect of the statute of limitations by questioning the validity of the tax judgment. This they cannot now do. If the judgment was valid and the tax deed was regular, there would be no need of the statute, which was enacted for the manifest purpose of

securing prompt action by parties wishing to set aside or cancel tax deeds.

The judgment is affirmed.

DUNBAR, C. J., ELLIS, CHADWICK, and MORRIS, JJ., concur.

[No. 9402. Department Two. August 3, 1911.]

JESSIE W. FISH, *as Administrator etc., Appellant*, v.

THOMAS FEAR *et al., Respondents*.¹

TAXATION—TAX TITLES—ACTIONS TO VACATE—LIMITATION OF ACTIONS. An action to cancel a tax deed is barred within three years, by Rem. & Bal. Code, § 162, although the tax judgment on which it was based was void for want of jurisdiction.

Appeal from a judgment of the superior court for Yakima county, Preble, J., entered September 26, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, dismissing an action to quiet title. Affirmed.

Parker & Richards, for appellant.

Floyd Hatfield, for respondents.

PER CURIAM.—This is an action to quiet title, but in effect to set aside and vacate a tax deed executed and delivered by the treasurer of Yakima county, more than three years prior to the commencement of the action.

The only question before us is whether the tax deed, conceded to be regular in form, is of itself sufficient to sustain respondents' title, after the running of the statute of limitations, Rem. & Bal. Code, § 162. Appellant contends there is an irregularity in the tax foreclosure proceedings which deprived the court of jurisdiction, and that he is now entitled to question the validity of the foreclosure decree upon

¹Reported in 116 Pac. 1083.

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which the tax sale and the tax deed are predicated. The trial court entered an order of dismissal, for the reason that the action had not been commenced within the time limited by law. On the authority of *Huber v. Brown*, 57 Wash. 654, 107 Pac. 850, and *Baylis v. Kerrick*, ante p. 410, 116 Pac. 1082, the judgment must be affirmed. It is so ordered.

[No. 9379. Department Two. August 3, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v. EDWARD
LA BOUNTY, *Appellant*.¹

ADULTERY—COMPLAINT BY HUSBAND OR WIFE—INFORMATION. Rem. & Bal. Code, § 2457, providing that no prosecution for adultery shall be commenced except on "complaint" of the husband or wife, prescribes a rule of law rather than a rule of evidence, and requires a complaint by the husband or wife before a magistrate; and an information by the prosecuting attorney is void if it fails to show that such complaint was made.

Appeal from a judgment of the superior court for King county, Ronald, J., entered October 8, 1910, upon a trial and conviction of adultery. Reversed.

P. V. Davis, for appellant.

John F. Murphy, Herbert B. Butler, and Hugh M. Caldwell, for respondent.

DUNBAR, C. J.—The appellant, a boy of eighteen years of age, was tried for committing the crime of adultery with a married woman twenty-eight years old, the mother of three children, having been married twelve years. He was convicted as charged, sentence and judgment followed, and he brings the case here on appeal.

Many errors are assigned, but with the view we take of one,

¹Reported in 116 Pac. 1073.

it will not be necessary to discuss the others. Rem. & Bal. Code, § 2457, is as follows:

“Whenever any married woman shall have sexual intercourse with a man other than her husband, whether married or not, both shall be guilty of adultery and punished by imprisonment in the state penitentiary for not more than two years or by a fine of not more than one thousand dollars: Provided, that no prosecution for violation of this section shall be commenced except on complaint of the husband or wife, nor after one year from the commission of the offense.”

The information in this case was sworn to by the prosecuting attorney of King county. The question of the sufficiency of the information was duly raised by instructions offered and refused, the court holding that the information was sufficient as filed by the prosecuting attorney. The contention of the appellant is that, under the statute, no one but the husband or wife could institute criminal proceedings for adultery; while the contention of the respondent is that the statute is not to be literally construed, but that its requirements are met if the husband or wife shall cause the proceedings to be instituted.

The pertinent question is, was the provision of the statute above cited intended to be mandatory in its nature, making a formal complaint by the husband or wife a prerequisite to the procedure prescribed; or was it intended simply to be a rule of evidence, the sufficiency of which could be submitted to the jury as a question of fact? We are inclined to the view first above expressed. Before the passage of this law by the legislature of 1909, the procedure governing this particular crime was not differentiated from the procedure in criminal actions generally; but the evident intention of the legislature which incorporated the proviso in the law was to prohibit intermeddling, evidently regarding the commission of this particular act as a crime against the husband or wife personally rather than as a crime against society, leaving the husband or wife at liberty to condone

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the offense if he or she desired so to do, unembarrassed by the publicity incident to a prosecution instituted by the officers of the state.

It is insisted by the respondent that this view of the law would prevent a prosecution for the crime of adultery except upon a formal written complaint by the husband or wife filed with a magistrate. This practice would, of course, not be in conformity with the general criminal procedure. But as we have seen, under any view, the legislature intended to place a limitation upon prosecutions for this crime, and to take the procedure out of the operation of the general criminal law. The legislature had full power to deal with the subject, and when it provided that the complaint could be made only by the husband or wife, it is not inconsistent to conclude that the intention was that it could be made only in the manner provided by law for the making of complaints by private individuals. The legislature, no doubt, deemed it wise public policy to take this duty or privilege from the prosecuting attorney and confer it upon the husband or wife, and upon questions of public policy its will is supreme. It is scarcely conceivable that the legislature used the word "complaint" in the sense of lamentation, fault-finding, repining, or accusation, or in any other than its legal sense. Webster, after giving the multitudinous definitions of the word, defines "complainant in law" as one who commences a legal process by a complaint; and Bouvier says it is a technical term descriptive of proceedings before a magistrate. It must be borne in mind that the legislature was using the word in its legal sense. It was a legal proposition it was dealing with, viz., the institution of a criminal proceeding under the forms of law. One of the rights of defendant charged with this crime would be to know whether the complaint had been made by the husband or wife as prescribed by law. This information he would have a legal right to have before he could be put upon trial. The only way that he could obtain

it would be from the information or indictment itself. If the indictment or information did not disclose this fact, it would be subject to a demurrer as any other indictment would be that did not comply with the terms of the law upon which it was based. The demurrer would have to be decided upon the face of the information, and not upon testimony adduced. Hence, we conclude that the statute prescribes a rule of law instead of a rule of evidence.

The information was void, and the judgment will be reversed with instructions to dismiss the action.

MORRIS, ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 8838. *En Banc*. August 3, 1911.]

C. B. BUSSELL *et al.*, Respondents, v. E. W. Ross, as
Commissioner of Public Lands, *et al.*, Appellants.¹

PUBLIC LANDS—TIDE LANDS—FILLS—COST OF FILL IN STREETS. Where a contract for filling unplatted tide lands, under Rem. & Bal. Code, § 8103, limited the cost to 16 cents per cubic yard, and subsequently the lands were platted, the cost of the fill in streets and alleys is to be added and charged to the abutting lands; even if it was contemplated, at the time the contract was made, that the land was to be platted, in view of Rem. & Bal. Code, § 8107, providing that the cost of filling streets and alleys shall be apportioned to the lands benefited; since the purchaser of platted tide lands, under his preference right, takes the fee of the abutting streets.

Appeal from an order of the superior court for King county, Main, J., entered December 8, 1909, granting an injunction *pendente lite* after a hearing before the court. Reversed.

W. V. Tanner, M. B. Sachs, Roberts, Battle, Hulbert & Tennant, and Hughes, McMicken, Dovell & Ramsey, for appellants.

¹Reported in 116 Pac. 1088.

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Harold Preston and George E. de Steiguer, for respondents.

Frederick Bausman, *amicus curiae*.

ON REHEARING.

MOUNT, J.—The original opinion in this case will be found in 60 Wash. 344, 111 Pac. 165. A rehearing was granted after the opinion was filed. We are convinced upon this rehearing that in our former opinion we did not give sufficient importance to the fact that, at the time the original and supplemental contracts were made, the land embraced therein was not subdivided into lots and blocks with streets and alleys. Subsequent to the making of the contract, the land was platted into lots and blocks, streets and alleys. The contracts were executed in October, 1894, pursuant to the act of 1893, as stated in the former opinion. The tide land plats embracing this land were filed in March, 1895, so that, when the lands were filled under the contract, they were platted into lots and blocks.

Counsel for respondents concede upon this rehearing that, if the lands had not been platted into lots and blocks, the appellants, under the contract, would have been entitled to sixteen cents per cubic yard for each cubic yard of fill made upon the entire tract; and this we think is clearly apparent from the contract itself, and is decisive of the main question presented. The effect of our decision upon the former hearing was to limit the lien for fills to "sixteen cents for each cubic yard of earth put upon each parcel of land." In other words, the result was that the cost of fills made upon streets and alleys could not be made a lien upon the adjoining lots and blocks. After a reargument and reconsideration of the case, we are satisfied that we were in error in this respect. The contract was made when the tract of land to be filled was unplatted. The limit of cost was fixed at "sixteen cents per cubic yard for each and every yard of earth put upon each tract or parcel of land to which any person or

corporation has a preemption right of purchase, except as hereinafter provided." The statute under which the contract was made provides that:

"The cost of filling in and raising above high tide of all streets, alleys and public squares or places, shall be apportioned to the land benefited thereby, in addition to the cost of filling in such land." Rem. & Bal. Code, § 8107.

It is plain that the cost of filling the streets, alleys, and public squares and places was chargeable to the lots and blocks benefited, in addition to the cost of filling such lots and blocks. To hold otherwise would be to say that the platting of the land after the contract was entered into lessened the value of the contract by the number of yards of earth required to fill streets, alleys, and public squares and places. No such result followed, for the subsequent platting of the land did not change the contract in the least.

Respondents argue that the parties, at the time of the making of the contract, contemplated that the land would be platted into lots and blocks. If we assume that the parties understood at that time that the lands would subsequently be platted, the provision that the cost of filling streets, etc., should be apportioned to the land benefited, in addition to the cost of filling in such land, seems to make it clear that the cost of such street fills should be added to the sixteen cents cost of the land filled. In our former opinion we said that this provision did not fix the limit of price, but provided a method of determining the cost. It also provides for adding street fills to the cost of the lot and block fills where lands were platted. Respondents also argue that there is no "preference right to purchase" streets, and therefore that the cost of filling the streets could not attach to the lots and blocks so that the same might exceed sixteen cents per cubic yard. Before the land was platted, a preference right purchaser had the right to purchase all the land in front of his upland. After the plat was made, he had the same right, but he took the land subject to the plat, and he acquired the

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fee of the streets subject to the public easement. His rights and burdens were not affected by the plat. They were the same after as they were before the plat was filed. This provision of the contract has reference to the land before it was platted into lots and blocks with streets, etc., and has no application to platted land. It follows a description by metes and bounds of the land covered by the contract, and it contemplates purchases of parcels thereof by upland owners who had certain preference rights to purchase from the state the tide lands lying in front of the upland.

Respondents' claim for a restraining order is based upon alleged excess charges for fills in the respects above mentioned, and that the commissioner of public lands has exceeded his authority in issuing certain certificates for amounts in excess of sixteen cents per cubic yard for fills. We are of the opinion that the commissioner of public lands is the proper officer to determine the cost of such fills, and since no fraud or abuse of authority is shown, the court erred in granting the order appealed from. The order is therefore reversed.

DUNBAR, C. J., PARKER, MORRIS, GOSE, ELLIS, and CROW, JJ., concur.

[No. 9437. Department Two. August 4, 1911.]

JENNIE F. READY *et al.*, *Respondents*, v. SOUND INVESTMENT
COMPANY, *Appellant*.¹

TAXATION—TAX SALES—LIENS—VENDOR AND PURCHASER—TITLE OF VENDOR. Under Laws 1891, p. 167, § 5, providing that purchasers at tax sales prior to November 1891 shall have no lien on the property as against purchasers in good faith, unless they file their tax certificates or deeds for record on or before the first day of November 1892, a sale for taxes in 1884, not recorded as required, does not constitute a defect in the title and a vendee cannot rescind a sale on account thereof.

VENDOR AND PURCHASER — CONTRACTS — PERFORMANCE — TITLE OF VENDOR—UNPAID TAXES. The vendee's default in the first payment on a land contract is not excused by objections to the title going only to small sums for taxes and assessments which were not yet delinquent, where the contract gave the vendor until that time to cure the defects, and he had been notified by the vendee that the vendee would have to default in the payment, after which nothing further was done by the vendee toward acquiring the property; and the vendee cannot thereafter recover a deposit on the ground of defect of title without offering to perform.

Appeal from a judgment of the superior court for King county, Yakey, J., entered September 23, 1910, upon findings in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Reversed.

Ira Bronson, for appellant.

Jay C. Allen, for respondents.

MORRIS, J.—Action by respondents to recover back money paid upon a contract for the purchase of real estate. The contract was entered into February 14, 1907, and fixed the price of the land at \$35,000, \$2,000 of which was paid at the time, \$14,000 was to be paid upon the delivery of deed within sixty days, and the balance was to go as a mortgage, bear-

¹Reported in 116 Pac. 1093.

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ing interest at six per cent. Abstract was to be furnished, showing good title and freedom from liens; defects, if any, to be pointed out in ten days after receipt of abstract; and if the claimed defects could not be cured and the title made good, the \$2,000 was to be refunded. Time was of the essence, and the \$2,000 was to be forfeited if the second payment was not made in time; providing, of course, the title was good, or could be made good within the life of the contract. Appellant furnished an abstract, and respondent had same examined and, on March 5, procured an opinion from the examining attorney suggesting three defects by way of incumbrance: (1) That the property had been sold for unpaid county taxes in 1884; (2) that the taxes for 1906, amounting to \$318, had not been paid; (3) that a special assessment in the sum of \$56.61 for sidewalks had been laid against the lot, payable in five annual installments, the first of which would become delinquent in February, 1908. A copy of this opinion was handed appellant.

A few days before the sixty days expired in which the second payment was to be made, Mrs. Ready notified appellant she would be unable to make it, and requested an extension of thirty days. The result of these negotiations was a written offer by appellant, dated April 16, to extend the payment of the \$14,000 an additional thirty days, conditioned upon respondent then making the payment \$15,000 with interest at six per cent. This respondent declined to do, and on the same day filed the contract for record. At that time the taxes and local assessment had not been paid. Nothing more seems to have been done by either party, except that on May 13, 1907, appellant paid the taxes, and on June 22, the local assessment; until about September, 1909, when appellant tendered a deed to respondent and demanded the deferred payment, which respondent refused. She thereupon brought this action to recover the \$2,000, and obtained a judgment, from which this appeal is taken.

The finding upon which judgment was based was the sale

for county taxes in 1884, and the failure to pay the taxes and local assessment within the sixty days, for these reasons appellant's title being held defective. The respondent, not having performed, nor offered to perform, her part of the contract, could not recover, unless performance on her part was excused by reason of defects in the title claimed to be shown by the abstract. We must, therefore, first determine, were there such defects as to excuse performance on her part. Under its agreement, appellant was bound to furnish a good title or clear the property from any claimed defects within sixty days from its date. So far as the abstract showed, there were no defects against this title which could not have been easily cleared up. The sale for the county taxes in 1884 was not shown as a present lien, because the abstract failed to show a compliance with § 5, chap. 85, p. 167, Laws 1891, providing that:

“Purchasers of real estate at tax sale prior to the first day of November, 1891, shall have no lien against said real estate for the amount of their payments, nor any title to said land, as against purchasers or incumbrancers for value and in good faith, unless they shall duly file their certificates of purchase, or tax deeds in case the same may have been issued, for record in the office of the county auditor on or before the first day of November, 1892.”

No certificate of purchase or tax deed having been filed as required by the above act, the property was not subject to any lien created by the sale; and the sale alone, not being a lien, could offer no excuse to respondent. The taxes and local assessment, while due, did not become delinquent until June 1 and February 12 following, and appellant was not required to pay them except as within the terms of the contract, on or before April 16. The purpose of this provision was to insure these payments by appellant, and as respondent was to pay \$14,000 to appellant within the same time, she had it within her own power to compel appellant to convey the property free from any burden of these liens. Respondent had, however, notified appellant that she would not be able to make

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the payment on April 16, and requested an extension of thirty days. Her refusal to make the payment, and her notification to appellant that she would not do so, would excuse any further performance on its part. Had she accepted the extension, such extension would have operated to the benefit of appellant as well as respondent, and it would not have been required to do anything further until the expiration of that time.

It is apparent from this record that it was not the failure to pay the taxes and local assessment that caused respondent to abandon this purchase, but her failure to obtain the money with which to make the \$14,000 payment, or to obtain a satisfactory extension. Having notified appellant, prior to April 16, of her inability to make the payment and her wish for an extension, the law would hardly, with such a knowledge on its part, require the doing of a useless thing by appellant, and require it to make a payment of this tax and local assessment in order to clear a title not required, if at all, for thirty days. If respondent could not pay within the sixty days, and so notified appellant, it would excuse its further performance within that time. Had she obtained an extension, it would have waived it, because the covenants were mutual and dependent. *Kane v. Borthwick*, 50 Wash. 8, 96 Pac. 516, 18 L. R. A. (N. S.) 486; *Martin v. Pierce*, 57 Wash. 389, 106 Pac. 1127.

The payment of the taxes was comparatively a small matter, and as appellant was to receive a payment from respondent of \$14,000, there could be little if any question concerning its willingness and ability to perform that part of its contract, a performance which respondent, by virtue of the \$14,000 payment, had at all times within her power. It was her default rather than appellant's that breached this contract; and such being the case, it was immaterial that these small defects existed against this title, which could have been removed at almost a moment's notice. *Johnston v. Johnson*, 43 Minn. 5, 44 N. W. 668; *Hampton v. Speckenagle*, 9 Serg.

& Rawle 212, 11 Am. Dec. 704; *Irvin v. Bleakley*, 67 Pa. St. 24; *Boyd v. McCullough*, 137 Pa. St. 7 (*Johnson v. Hopwood*), 20 Atl. 630. It is clear it was not the unpaid tax and local assessment, but her inability to make the \$14,000 payment, that caused respondent to decline to proceed further. Her subsequent conduct is further proof of this fact. She took no step toward acquiring the property when the tax and assessment were paid shortly thereafter. She abandoned the contract and the property for two and a half years, and until after appellant tendered its deed and demanded the deferred payment, about September, 1909, before commencing this action. She could not then, never having performed nor offered to perform, put appellant in default so as to maintain this action. The time fixed in the contract having passed with no performance, nor offer to perform by either party, the time of performance became indefinite, although still remaining mutual and dependent; and neither party could put the other in default without an offer to perform.

We cannot reach the same conclusion as the trial judge, and the judgment is reversed.

CHADWICK, ELLIS, and CROW, JJ., concur.

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[No. 9476. Department Two. August 4, 1911.]

GUST FORSBERG *et al.*, Appellants, v. ALBERT LUNDGREN
et al., Respondents.¹

LOGS AND LOGGING—LIENS—RAILROAD TIES—RIGHT OF LIEN—STATUTES. Under Rem. & Bal. Code, § 1163, giving a lien for work in manufacturing saw logs and other timber into lumber, "while it remains at the mill where it was manufactured," and defining lumber to include all timber sawed or split, including every article manufactured from saw logs or other timber, there can be no lien on railroad ties manufactured elsewhere than at a mill, nor after the removal of ties from the mill where manufactured.

SAME. Rem. & Bal. Code, § 1162, giving a lien for labor in obtaining or securing saw logs, spars, piles, cordwood, shingle bolts, or other timber, includes railroad ties, under the rule of *ejusdem generis*.

SAME—ACTION TO FORECLOSE—FINDINGS—REMOVAL. A finding that railroad ties were cut and manufactured in the woods precludes any inference that they were manufactured at a mill, within the meaning of Rem. & Bal. Code, § 1163, limiting liens on such ties to the time which they remain at the mill.

SAME—ENFORCEMENT OF LIEN—PROCEEDS OF SALE. On the removal from the state of railroad ties manufactured elsewhere than at a mill, a logger's lien thereon should be enforced out of the proceeds of the sale thereof, garnished and paid into the registry of the court.

Appeal from a judgment of the superior court for Skagit county, Joiner, J., entered February 17, 1911, in favor of the defendants, after a trial on the merits before the court without a jury, in an action to foreclose a logger's lien. Reversed.

Million, Houser & Shrauger, for appellants.

Coleman & Gable, for respondents.

ELLIS, J.—The appellants were laborers employed by the respondents Lundgren and Hedstrom in cutting and manufacturing railroad ties in the woods near the line of the Great

¹Reported in 117 Pac. 244.

Northern Railway, in Skagit county, Washington. They began the work sometime in August, 1909, and ceased on June 16, 1910. The ties as completed were from time to time delivered upon the right of way of the railway company and were sold to respondent Pacific Fir Company, which company turned them over to the railway company. Usually an inspector of the railway company inspected the ties on the right of way, from the first to the tenth of each month, and they were usually removed during that month by the railway company. Such an inspection was made on June 4, 1910. There were then upon the right of way 1,731 inspected and accepted ties. Before June 16, the railway company removed these ties outside of the state. By June 16, when the appellants quit work, there had again accumulated 700 ties upon the right of way. These still remained there when, on June 30, appellants filed their notice claiming a lien upon these 700 ties and also upon the 1,731 ties which had been removed. On April 25, 1910, respondent Pearson took from Lundgren and Hedstrom an assignment, addressed to Pacific Fir Company as follows: "Until further notice, please pay to the order of Mr. Gus Peterson, of Seattle, all moneys that may become due us hereafter for ties inspected and accepted for our account." On the same day, this order or assignment was served upon the Pacific Fir Company.

On June 9, 1910, respondent Grassmere Shingle Company began an action against Lundgren, Hedstrom and Pearson or Peterson, and garnished the Pacific Fir Company. That company answered in the present action, admitting the purchase of the ties from Lundgren and Hedstrom for \$467.37, which sum it tendered into court in this case, and was, by consent of all concerned, discharged from further liability on account of the garnishment. The trial court sustained the appellants' lien upon the 700 ties remaining upon the railroad right of way, but denied a lien upon the 1,731 ties which had been removed or upon the proceeds thereof then in the registry of the court, whereupon this appeal was taken.

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The sole question for our consideration is whether, under these admitted facts, the appellants are entitled to a lien upon the 1,781 ties or the proceeds thereof. The right of lien, if it exists at all, must be found either in § 1162 or § 1163 of Rem. & Bal. Code. Section 1163 is as follows:

“Every person performing work or labor or assisting in manufacturing saw logs and other timber into lumber and shingles, has a lien upon such lumber while the same remains *at the mill where it was manufactured*, or in the possession or under the control of the manufacturer, whether such work or labor was done at the instance of the owner of such logs or his agent or any contractor or subcontractor of such owner. The term lumber, as used in this chapter, shall be held and be construed to mean all logs or other timber sawed or split for use, including beams, joists, planks, boards, shingles, laths, staves, hoops, and every article of whatsoever nature or description manufactured from saw logs or other timber.”

This section cannot apply to any of the ties here in question for two reasons: first, because it only contemplates a lien on things manufactured at a mill; and second, because it only accords the lien while the things remain at the mill where they were manufactured, or in the possession or under the control of the manufacturer. While the term “lumber” is defined in the last sentence of this section, still the definition there given, when applied to the word lumber as used in this section, can only include articles manufactured from saw logs or other timber when manufactured at a mill. The definition is broad enough to include railroad ties, but the context excludes ties manufactured elsewhere than at a mill from the operation of the lien. It follows that if a lien can be maintained on any of these ties it must be under Rem. & Bal. Code, § 1162, the pertinent part of which is as follows:

“Every person performing labor upon, or who shall assist in obtaining or securing saw logs, spars, piles, cordwood, shingle bolts, or other timber, . . . shall have a lien upon the same for work or labor done upon, or in obtaining or securing, . . . the particular saw logs, spars, cordwood,

shingle bolts, or other timber in said claim of lien described," etc.

The words "cordwood" and "shingle bolts" were inserted in this section by chapter 88, p. 175, § 1, Laws of 1895, and the amendment of 1907, chapter 9, p. 14, § 1, Laws of 1907, broadened the application of the original section as to the persons benefited.

In *Ryan v. Guilfoil*, 13 Wash. 373, 43 Pac. 351, which respondents claim is decisive of this case, this court held that the words "other timber" as used in the original section, Rem. & Bal. Code, § 1162 (Laws 1893, p. 428, § 1), did not include fence posts, because the other things there specifically enumerated, namely, saw logs, spars, and piles were things of which the manufacture is not yet completed, while fence posts are something the manufacture of which is complete. The court was of the opinion that "other timber" as there used could only apply to things of the same unfinished nature as the things enumerated, and that fence posts, whether sawed or split, would thus come under the definition of lumber as defined in the second section of the act of 1893. The amendment of 1895, inserting the words "cordwood" and "shingle bolts," was either not in force when the lien in that case was initiated or was not called to the attention of the court, since the decision refers to and quotes the original section as before the amendment. Since the amendment of 1895, adding the words cordwood and shingle bolts, the reason for the decision in *Ryan v. Guilfoil* no longer applies. Cordwood is obviously a completed article, and a shingle bolt had, prior to the amendment, been repeatedly classified as "a manufactured article" by this court, and therefore held to come within the definition of "lumber" found in § 1163. *Hadlock v. Shumway*, 11 Wash. 690, 40 Pac. 346; *Campbell v. Sterling Mfg. Co.*, 11 Wash. 204, 39 Pac. 451.

The legislature, by the amendment of 1895, having ex-

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pressly made both of these manufactured articles subject to the lien provided in § 1162 without further limiting the words "other timber," it is plain that the reasoning employed in *Ryan v. Giulfoil* would no longer exclude either fence posts or railroad ties from the operation of § 1162 unless they were manufactured in a mill. Applying the rule *ejusdem generis*, on which that decision rests, to the amended statute, we find that manufactured articles can no longer be excluded, and since both fence posts and railroad ties when manufactured elsewhere than in a mill are things *ejusdem generis* with cordwood and shingle bolts, they are now included in the general words "or other timber." The supreme court of Wisconsin has held that the word "timber," when used in a statute giving a lien on "logs and timber" for labor performed thereon, is sufficiently broad to include railroad ties. *Kollock v. Parcher*, 52 Wis. 393, 9 N. W. 67.

Moreover, it is now plain that the legislature intended to accord a lien to all persons who have performed labor in manufacturing articles from timber whether in a mill or elsewhere. Since § 1163 gave the lien only on articles manufactured at a mill, there would be no lien at all on completely manufactured articles made elsewhere unless given by § 1162. It was doubtless amended to meet just such a situation as that here presented.

Counsel for respondent objects that the record does not disclose how the ties were manufactured, and that they may have been sawed by a portable sawmill or split by a maul and wedge. We find no merit in this contention. The court found that the ties were cut and manufactured in the woods, which precludes any inference that they were manufactured at a mill within the meaning of § 1163.

The trial court was correct in allowing the lien upon the 700 ties remaining on the right of way, but erred in refusing the lien upon the 1,731 ties which had been removed, or on the proceeds of the sale thereof. The cause is remanded with

direction to modify the judgment in accordance with this opinion.

DUNBAR, C. J., CHADWICK, MORRIS, and CROW, JJ., concur.

[No. 9462. Department One. August 5, 1911.]

THE STATE OF WASHINGTON, *Respondent*, v.
MORRIS FALKENSTINE, *Appellant*.¹

INTOXICATING LIQUORS—SALES WITHOUT LICENSE—STATUTES—CONSTRUCTION. Under Rem. & Bal. Code, § 6269, providing that any person selling intoxicating liquor on any steamboat shall pay an annual state license fee in addition to the license fee fixed by any city, town or county where such liquor is sold, and Id., § 6263, giving the county commissioners of each county the sole and exclusive authority to regulate the sale of spirituous liquors outside of the corporate limits of a town, a license is required from each county in which the steamboat sells intoxicating liquors; and the same is not excused by a state or by a Federal license.

INTOXICATING LIQUORS—LICENSE—REASONABLENESS — PROHIBITION. The requirement that a steamboat secure a county license for the sale of intoxicating liquors in each county through which it passes is not objectionable because it is unreasonable or prohibitory, as the legislature has the right to prohibit the sales.

APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE. Upon a prosecution for maintaining a nuisance by the sale of liquors without a license, error in admitting evidence to show that the liquor was kept in the place is harmless where there was no dispute upon that question.

Appeal from a judgment of the superior court for Kitsap county, Yakey, J., entered November 19, 1910, upon a trial and conviction of maintaining a nuisance. Affirmed.

Ira Bronson and Byers & Byers, for appellant.

Thomas Stevenson (Boyd P. Doty, of counsel), for respondent.

MOUNT, J.—The appellant was convicted upon a charge of maintaining a nuisance, which consisted in selling intoxicat-

¹Reported in 117 Pac. 254.

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ing liquors in Kitsap county without having obtained a license from said county. He appeals from a sentence pronounced upon a verdict of the jury.

It appears that the appellant was employed as a steward on board the S. S. Kennedy, a steamship plying on Puget Sound between Seattle, in King county, and Bremerton, in Kitsap county. The ship maintained a bar at which intoxicating liquors were sold. The appellant had charge of the bar and the sale of the liquors. The company owning the ship had procured a United States government license and also a state license for the sale of liquors, but had not procured a license from Kitsap county for the year 1910. On July 19 of that year, while the vessel was *en route* from Seattle to Bremerton and when she was within Kitsap county, appellant sold to three different parties each a bottle of beer, an intoxicating liquor. The main question in the case is, whether a steamboat operating within the state is required to obtain a license from each county in which it sells intoxicating liquors. The question was presented upon demurrer to the information, and upon motion for a directed verdict in favor of the defendant. The statute, Rem. & Bal. Code, § 6263, provides as follows:

“The board of county commissioners of each county in the state of Washington shall have the sole and exclusive authority and power to regulate, restrain, license, or prohibit the sale or disposal of spirituous, fermented, malt, or other intoxicating liquors outside of the corporate limits of each incorporated city, incorporated town, or incorporated village in their respective counties: Provided, that the annual license fee for the sale of spirituous, fermented, malt, or other intoxicating liquors shall, in no instance, be less than three hundred dollars or more than one thousand dollars, which said license fee shall be paid annually in advance to the county treasurer, who shall pay ten per cent of the amount into the general fund of the state treasury, thirty-five per cent into the county school fund, and the remaining fifty-five per cent into the general county fund: Provided further, that no license shall be granted to sell spirituous, fermented,

malt, or other intoxicating liquors by said county commissioners within one mile of the corporate limits of any incorporated city, town or village.”

The next section gives to cities and towns the exclusive authority to regulate or prohibit the sale of liquors within the corporate limits thereof. The next three following sections provide for the payment of the license fee and the giving of a bond by the applicants for the license. Then Rem. & Bal. Code, § 6268, provides:

“Nothing in this act shall be held or construed to allow any person, firm, or corporation to barter, sell, or otherwise dispose of any spirituous, malt, fermented or other intoxicating liquors without having first obtained a license therefor, as required by the provisions of this chapter, except as provided in section 6275 *infra*.”

Section 6275 provides when druggists may sell without a license. Then § 6269 provides as follows:

“Every person, firm, or corporation selling any spirituous, fermented, malt or other intoxicating liquor, at any place within this state or upon any steamboat, steamship or other vessel plying upon the waters of the state or between places within the state or upon any dining-car, buffet-car, or other public conveyance in the state, shall pay for the privilege of so doing an annual state license fee of twenty-five (\$25) dollars, in addition to the license fee fixed by any city, town, or county where such liquor is sold which sum shall be in addition to the amount now required to be paid to the state on account of any license for such purpose.”

Section 6271 provides the method of obtaining the state license. Section 6269, *supra*, was a part of the act of 1907, which we held in *State v. Putnam*, 60 Wash. 386, 111 Pac. 239, was a revenue act solely for the state, but did not change the requirement that every person, firm, or corporation selling liquor within the state shall be obliged to obtain a license therefor from the cities where offered for sale, or from the county commissioners when offered for sale outside of the incorporated cities and towns.

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Section 6269 seems too plain for construction. It says every person, firm, or corporation selling intoxicating liquors "at any place within this state or upon any steamboat . . . shall pay for the privilege of so doing an annual state license fee of twenty-five (\$25) dollars, in addition to the license fee fixed by any city, town, or county where such liquor is sold." This does not mean that the state license fee shall authorize the sale of liquors without the local license fee, for it is clearly stated to be in addition to the local fee. A license from the United States government does not excuse one from obtaining a local state license. *Pierson v. State*, 39 Ark. 219; *Boyd v. State*, 80 Tenn. 687. So, likewise, the license from the state did not excuse the steamboat company from obtaining the local county license, because, by the very terms of the statute, the state license fee was fixed as additional to the local fee.

It is argued by the appellant that the legislature did not intend to require steamboats plying between places within this state, and which might pass through a dozen or more counties on its route, to obtain a license from each county through which such vessel passed, because such requirement would be unreasonable and prohibitory. We may concede that the provision may seem unreasonable and prohibitory, but the legislature had the right to prohibit in such cases, and when it has spoken, the language must be construed reasonably. If the legislature had intended to permit the sale of liquor upon steamboats plying between different places and through different counties for an annual license fee of \$25, it would not have added "in addition to the license fee fixed by any . . . county where such liquor is sold." The provision is plain, and we are of the opinion, therefore, that the local county license was required in this case.

Appellant argues that the court erred in receiving in evidence certain bottles containing liquor. These bottles it appeared were procured upon a search warrant, which was served three days after the date of the sales complained of,

and after the time when the nuisance was alleged to have existed. This evidence was offered to prove that liquors were kept in the place. There was no dispute upon the question that the liquors were kept there for sale, and it follows that, if it was error to receive the evidence, the error was not prejudicial.

Appellant argues two or three other questions, but these were questions of fact for the jury, and the findings thereon are clearly supported by the evidence.

We find no error, and the judgment is therefore affirmed.

DUNBAR, C. J., PARKER, FULLERTON, and GOSE, JJ., concur.

[No. 9241. Department One. August 7, 1911.]

THOMAS E. GRADY, *Receiver of the Yakima Improvement Company, Plaintiff*, v. A. B. GRAHAM, *Defendant*.¹

CORPORATIONS—INSOLVENCY—STOCKHOLDERS—LIABILITY ON UNPAID SUBSCRIPTIONS — RECEIVER'S SUIT — ORDER — DEFENSES — DISPUTING CLAIMS. An *ex parte* order fixing the amount necessary to pay the debts of an insolvent corporation, and directing the receiver to recover the same from stockholders on their unpaid stock subscriptions, is not binding upon stockholders as to the amount or validity of the claims of the creditors; and in the receiver's following action upon an unpaid stock subscription to recover such sum, the stockholder is entitled to dispute the claims of creditors, and reduce the amount of his liability accordingly (PARKER, J., dissenting).

CORPORATIONS—STOCKHOLDERS — LIABILITY FOR DEBTS — WAIVER—CORPORATE BONDS. Since a corporate creditor may waive his right to enforce the stockholder's liability, unpaid stock subscriptions cannot be collected to pay corporate bonds which provide that there shall be no recourse to stockholders for the payment of the bonds or any interest thereon.

Cross-appeals from a judgment of the superior court for King county, Tallman, J., entered May 4, 1910, upon the

¹Reported in 116 Pac. 1098.

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verdict of a jury rendered in favor of the plaintiff, in an action by a receiver to recover on an unpaid subscription to corporate stock. Reversed on defendant's appeal.

Richard S. Eskridge, Frederick W. Dewart, and Ira Bronson, for plaintiff, contended, among other things, that it was within the province of the court to determine the amount which will be necessary to pay the corporate debts and to direct the receiver to collect the same. *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536; *Cumberland Lumber Co. v. Clinton Hill Lumber & Mfg. Co.*, 64 N. J. Eq. 517, 54 Atl. 450. Accordingly, a binding assessment may be levied without the presence of the stockholder or service of process upon him. *Elderkin v. Peterson*, 8 Wash. 674, 36 Pac. 1089; *Glenn v. Liggett*, 135 U. S. 533; *Hawkins v. Glenn*, 131 U. S. 319; *Sanger v. Upton*, 91 U. S. 56; *Langworthy v. Garding*, 74 Minn. 325, 77 N. W. 207; *Furnald v. Glenn*, 56 Fed. 372. The order of assessment is conclusive, unless directly attacked and set aside by appropriate judicial proceedings, although made without personal notice to the stockholder. *Great Western Tel. Co. v. Purdy*, 162 U. S. 329; *Castleman v. Templeman*, 87 Md. 546, 40 Atl. 275, 67 Am. St. 363, 41 L. R. A. 367; *Collins v. Welch*, 141 Mich. 676, 105 N. W. 31.

Lester E. Kirkpatrick and Peters & Powell, for defendant, contended, *inter alia*, that the stockholder had a right to show that the action is founded upon the claims of creditors for which he is not in law liable. 10 Cyc. 734, § E; 1 Cook Stock and Stockholders and Corporation Law (3d ed.), § 209; *Bohn v. Brown*, 33 Mich. 257; *Wilson, McElroy & Co. v. Stockholders of Pittsburgh & Y. Coal Co.*, 43 Pa. St. 424; *Ward v. Joslin*, 100 Fed. 676; *Conant v. Van Schaik*, 24 Barb. 87; *Larrabee v. Baldwin*, 35 Cal. 155; *Devin v. Walsh*, 108 Iowa 428, 79 N. W. 133.

FULLERTON, J.—The Yakima Improvement Company is a corporation organized under the laws of the state of Wash-

ington, having a capital stock of \$1,000,000, divided into 10,000 shares of the par value of \$100 each. The corporation was formed by certain persons holding a franchise from the city of North Yakima for installing a gas lighting plant therein, and the stock of the corporation was issued to the incorporators in consideration of the transfer to the corporation of the franchise. The stock appeared on the books of the company as fully paid up. The consecutive order in which certain of the following proceedings took place is not shown very clearly in the record, but it appears that the corporation, being desirous of securing money for the installation of a gas lighting plant in the city of North Yakima, issued its coupon bonds to a considerable face value, probably some \$66,000, and sought to secure the same by executing a deed of trust of its franchise and other properties to the corporation called the Trustee Company, the deed being conditioned so as to pledge the mortgaged property to the payment of any bonds that should thereafter be sold or applied to the uses of the corporation. The bonds, while negotiable in form, contained the following clause, "There shall be no recourse to the stockholders, trustees or officers of said Yakima Improvement Company for the payment of this bond or any interest thereon." There proved, however, to be no market for the bonds, and other means had to be resorted to in order to procure the necessary funds to install the lighting plant.

In the meantime, the corporation had been negotiating with the Acetylene Contracting Company of Minneapolis, Minnesota, to install an acetylene gas lighting plant, and had reached an understanding with that company by which the company agreed to install such a plant for a cash consideration of \$16,000, the promissory note of the corporation for some \$5,300 secured by the corporation's negotiable bonds, and negotiable bonds themselves to the face value of some \$17,000. At this stage of the proceedings, A. B. Graham, the defendant in the present action, was applied to

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for the necessary cash advancement. After some negotiations, the money was advanced by Graham, he taking therefor an assignment of some 4,900 shares of the stock of the corporation and its negotiable bonds of the par value of some \$20,000. The lighting plant was thereupon installed for the consideration substantially as agreed upon, the work being completed in the early part of the year 1906. The plant, however, did not prove a financial success, and after being in operation for a short time, was shut down and practically abandoned by the corporation.

In March, 1907, the Acetylene Contracting Company began an action in the superior court of Yakima county against the Yakima Improvement Company to recover upon the promissory note given it for installing the gas plant, and judgment was entered in its favor on May 29, 1907. At the time of the commencement of the action by the Acetylene Contracting Company, the Trustee Company also brought an action to foreclose the lien created by the trust deed, making parties defendant the Yakima Improvement Company, A. B. Whitson, and the county of Yakima. In its complaint it prayed for the appointment of a receiver of the property of the Yakima Improvement Company, and for an injunction against the other defendants restraining them from interfering with the property or attempting to sell the same by judicial process or otherwise. Thos. E. Grady was appointed receiver pursuant thereto. Later on the receiver reported that the ordinary assets of the corporation were insufficient to pay its debts, and that there would be a balance of liabilities over assets of approximately \$25,000 after all of the property of the corporation had been converted into cash, and petitioned the court for permission to sue the stockholders of the corporation on their unpaid subscriptions to the capital stock of the corporation. No notice was given the stockholders in any manner of the pendency of the petition, but the court nevertheless, on June 29, 1907, made an order authorizing and directing the receiver "to commence

and prosecute such action in such court in such form as to him shall seem best, against such of the stockholders of the Yakima Improvement Company as to such receiver shall seem most desirable to recover therefrom on the unpaid stock liability the sum of \$25,000, in order to apply the same on the outstanding liabilities of the said Yakima Improvement Company.”

Pursuant to the foregoing order, the receiver brought the present action against Graham to recover \$25,000. In his complaint the receiver alleged that the defendant was the owner and holder of shares of stock in the corporation of the face value of \$213,200 on which only 5 per cent had been paid, leaving a balance unpaid thereon of \$202,540. The defendant answered, denying liability for any of the indebtedness of the corporation, on the ground that he was not a stockholder therein but held his stock as collateral security for advancements he had made to the corporation, and as a partial defense, denied liability on the bonded indebtedness of the corporation because of the clause of the bond exempting stockholders from liability thereon. He also set up fraud and collusion between certain of the trustees of the Yakima Improvement Company and the corporation installing the lighting plant, by which exorbitant and grossly excessive prices were paid for the lighting plant, thereby greatly increasing the apparent indebtedness of the first corporation. On the trial, which was had before the court and a jury, a verdict was returned in favor of the receiver for \$10,000, and from the judgment entered thereon, both parties appeal.

The receiver contends that the court erred in refusing to enter a judgment for the full amount demanded in the complaint, notwithstanding the verdict of the jury was for the lesser sum, arguing that the defendant cannot be heard in this action to question the validity of the order made in the receivership proceedings, either as to the necessity for the order or as to the amount thereof, and since the jury found

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him liable to answer, he must be held for the full amount. But as the defendant is liable as a stockholder, under normal conditions, to pay to the receiver on his unpaid stock only such an amount as will be sufficient with the other assets of the corporation to pay its valid indebtedness, and may be liable, under certain peculiar conditions, to pay only a part of such valid indebtedness, it would seem that at some time and some place he should be given an opportunity to show to the court what of the claimed indebtedness of the corporation is valid and what is not valid, and what of the valid indebtedness, if less than the whole, he is liable as a stockholder to pay. The court having in charge the receivership proceedings did not, in this instance, give the defendant this opportunity. In so far as he is concerned, the order fixing the amount to be paid in by the stockholders was *ex parte*. No notice of any hearing to determine the question was served upon him, either personally or otherwise, nor does it appear that he had actual notice of the hearing. If, therefore, notice to him was necessary in order to make the order conclusive, this order is not so.

It is argued, however, that no notice to him was necessary to make the order binding and conclusive upon him, and cases are cited which seemingly maintain this contention, some of which are from the supreme court of the United States. They proceed on the theory that the stockholders are an integral part of the corporation, and in view of the law, the stockholders are before the court in all proceedings "touching the body of the corporation." But we cannot accept this doctrine in its entirety. Doubtless the stockholders of an insolvent corporation which is in the hands of the court through its receiver are obligated and bound by all orders of the court affecting the property of such corporation of which the receiver has possession, whether or not they have received personal notice of such orders; but it is a different matter to say that the court may, on petition of the receiver in an *ex parte* order, conclusively obligate a stockholder to turn over to the

receiver property or money claimed by the receiver as property of the corporation, without giving the stockholder an opportunity to question the validity of that claim. So in this case, no doubt the court can require the receiver to apply the property in his hands to the satisfaction of such debts as shall be adjudged valid by the court on a hearing in which only the receiver and the creditor are parties, but the court cannot, on such a hearing, conclusively obligate a stockholder to create a fund for the payment of indebtedness disputed by the stockholder, or on which the stockholder denies liability. Before this can be done, the stockholder must be given an opportunity to defend against the order; he must be given his day in court. Counsel for the plaintiff say, however, that he cannot have his day in court for this purpose in this proceeding, that he must pay the money into court and contest his liability for the corporation's debts in the receivership action. But we think this not the better rule. Since he is entitled to his day in court to be heard on the validity and amount of the asserted debts of the corporation, he can make his defense in the first action to which he is a party in which it is sought to make him answer for such debts. There is no error, therefore, in the ruling complained of by the receiver.

There is nothing in the cases of *Shuey v. Adair*, 24 Wash. 378, 64 Pac. 536, or *Bennett v. Thorne*, 36 Wash. 253, 78 Pac. 936, 68 L. R. A. 113, that is contrary to the position herein taken. In each of these cases the stockholders were personally served with notice of the intended hearing brought on by the receiver to fix the amount of the unpaid indebtedness of the corporation for which the stockholders were liable, and that because of the notice in the one case, and the notice and participation in the hearing by the stockholders in the other, the orders became conclusive as to the amount of the stockholders' liability. Here, as we have said, there was no such notice.

On the appeal of the defendant, but one question is suggested. The court charged the jury to the effect that the

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stockholders of the corporation were liable on their unpaid subscription to the capital stock of the corporation for the payment of the bonds issued by the corporation, notwithstanding the clause therein before quoted purporting to exempt them from such liability. This is complained of as error, and we think rightly so. The general rule on the principle of law suggested is stated in 10 Cyc. 665, in the following language:

“There is no doubt that a creditor may, by express contract with the corporation, waive his constitutional or statutory right to proceed against its shareholders in case of its failure to pay the debts; and it is equally clear that the creditor may waive this right by contract even at the time of making the contract, or subsequently, assuming in the latter case that there is a consideration accruing to the creditor for such a release of his rights.”

This rule is in accord with trend of authority generally.

In 1 Cook on Stock and Stockholders and Corporation Law (3d ed.), § 216, it is said:

“A corporate creditor may, by express contract, when the debt is incurred, waive his right to collect from the stockholder debts which the corporation fails to pay. And the corporation in its contracts with third persons may, it is held in England, lawfully stipulate for the exemption of its members from the liability imposed upon them by statute in the event of the insolvency of the corporation.

“It has been held to be competent for any one dealing with the company to contract to hold the shareholders responsible to only a limited extent, to no extent at all, or to any specified extent mutually agreed upon.”

2 Morawetz on Private Corporations (2d ed.), § 871, announces the rule as follows:

“However, a statutory provision declaring that the shareholders in a corporation shall be individually liable to creditors would not prevent the execution of contracts into which this liability does not enter. If a person contracting with the corporation should expressly agree to accept the obligation of the corporation without the special liability of its shareholders, he would not be able to charge the latter. Such

a provision is solely for the benefit of those dealing with the corporation, and may be waived by them."

See, also, *Brown v. Eastern Slate Co.*, 134 Mass. 590; *Robinson v. Bidwell*, 22 Cal. 379; *Callanan v. Windsor*, 78 Iowa 193, 42 N. W. 652; *Carnahan v. Campbell*, 158 Ind. 226, 63 N. E. 384; *Bush v. Robinson*, 95 Ky. 492, 26 S. W. 178.

It seems to have been the view of the trial judge that this exemption did not apply to the liability of a stockholder to answer for the debts of the corporation to the extent of his unpaid stock subscription. But if this were the rule, the exemption contained in the bonds would be meaningless. Stockholders in a corporation organized in this state, other than banking corporations, who hold stock fully paid up in money or its value in money, are not liable to the corporate creditors whether such creditors be the holders of the bonds of the corporation or its simple contract debts. There is, therefore, no other obligation to which the exemption in this instance could apply, and we think it was meant that the stockholders should not be called upon on their unpaid stock subscriptions to liquidate these bonds.

It follows that the judgment must be reversed and remanded for a new trial. It is so ordered.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

PARKER, J. (dissenting).—I am of the opinion that the order of the superior court in the receivership cause, directing suit against the stockholders upon their unpaid stock subscriptions, was conclusive upon the stockholders as to the total amount fixed by that order, in so far as any defense they may make in such suits is concerned. A stockholder paying his unpaid stock subscription under the circumstances here involved will, of course, be entitled to be heard upon all questions touching his rights involved in the marshaling of assets and paying of claims in the receivership, as any other stockholder may be who has an interest in a possible surplus after payment of debts. And if a stockholder is exempt from

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contributing towards the payment of some particular class of debts, like one of those claimed to be here involved, he will also be entitled to be heard and resist the application of the money paid by him to such debt, but not in the suit wherein it is sought to recover from him by the receiver upon unpaid subscriptions. That is a debt he owes to the corporation, just like every other creditor owes the corporation. As to just how it shall be applied by the receiver in closing the affairs of the corporation, is a matter which it is wholly impractical to litigate in the suit against the stockholder. If every stockholder owing the corporation upon his unpaid subscription could litigate the question of the necessary amount for the receiver to collect, in a suit upon such subscription, then the question of the necessities of the receivership in that particular would be litigated just as many times as there might be number of suits against stockholders upon their unpaid subscriptions. For these reasons, I dissent from the views of the majority as to the finality of the order directing the suits against stockholders. I concur in the granting of a new trial.

[No. 9579. Department One. August 7, 1911.]

ELIZA FIELD, *Respondent*, v. SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, *Appellant*.

ELLA FIELD, *Respondent*, v. SPOKANE, PORTLAND AND SEATTLE RAILWAY COMPANY, *Appellant*.¹

NEGLIGENCE—IMPUTED NEGLIGENCE — CARRIERS — DRIVER OF STAGE. The negligence of the driver of a stage in failing to stop, look, and listen at a railroad crossing cannot be imputed to passengers for hire in a stage; and such negligence is imputed to the passenger by an instruction that the driver's failure to stop, look, and listen was the proximate cause of the injury, preventing any recovery, unless the plaintiffs themselves could have avoided the injury if the railroad company had performed its duty to signal its approach to the crossing.

¹Reported in 117 Pac. 228.

RAILROADS — ACCIDENT AT CROSSINGS — CONCURRING NEGLIGENCE. Where an accident to passengers in a stage at a crossing is caused by the concurring negligence of the railroad company in failing to give a signal and of the stage driver in failing to stop, look, and listen, they are both jointly and severally liable, and an instruction to the contrary is prejudicial error.

Appeal from an order of the superior court for Clarke county, McMaster, J., entered November 22, 1910, granting a new trial, after the verdict of a jury rendered in favor of one of the defendants, and the granting of a nonsuit in favor of the other defendant, in consolidated actions for personal injuries sustained by passengers through the overturning of a stage. Affirmed.

Carey & Kerr, Omar C. Spencer, and A. L. Miller, for appellant, contended, among other things, that the primary cause of the accident was the negligence of the stage driver, and any negligence of the railroad company only a remote and not the proximate cause of plaintiff's injury. 29 Cyc. 491, 498; *Crampton v. Ivie Bros.*, 126 N. C. 894, 36 S. E. 351; *Schwartz v. Shull*, 45 W. Va. 405, 31 S. E. 914; *Stone v. Boston & A. R. Co.*, 171 Mass. 536, 51 N. E. 1, 41 L. R. A. 794.

Frank E. Vaughan and Hayden & Langhorne, for respondents.

FULLERTON, J.—Sometime in July, 1908, the plaintiffs left their home in Lewis county, Washington, to visit certain mineral springs in Skamania county. The route they followed took them past Carson's Landing on the Columbia river, a point they reached in the due course of their journey. From Carson's Landing to the mineral springs, the only public conveyance was a stage. The stage route, which followed the regular wagon road, crossed the tracks of the defendant railway company a short distance after leaving Carson's Landing. To the right of the wagon road, the railroad passes through a deep cut extending back for a

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considerable distance, preventing an approaching train in that direction from being seen by travelers upon the wagon road. On the day in question the plaintiffs, with some sixteen other persons, boarded the stage at the landing, which then proceeded on its way to the springs. The stage was drawn by four horses, and just as the leading team reached the railway track, a train passed them coming through the cut from the right. The passing of the train so close to their front frightened the team, causing them to turn around and start back down to the road in the direction from which they came. The effect was to turn over the stage and throw the passengers out. The plaintiffs were injured, and brought actions against both the operators of the stage and the railway company to recover therefor. The actions were consolidated for the purpose of trial, and on the trial a motion for nonsuit was granted in favor of the stage company and a verdict returned in favor of the railway company. A motion for a new trial was interposed by the plaintiffs and granted by the trial court. This is an appeal by the railway company from the order granting a new trial.

The evidence of all the witnesses testifying on the subject is that the driver of the stage did not stop his team for the purpose of listening for an approaching train prior to reaching the railway crossing, and the plaintiffs' evidence tended to show, although contradicted by the defendant railway company, that the train gave no warning of its approach to the road crossing, and that it passed over the crossing at a high rate of speed.

In its charge to the jury the court gave, among others, the following instruction:

"A railroad track is a place of danger and it is the duty of anyone approaching a railroad crossing to stop, look and listen, and if a bus or wagon and team is being driven, the duty exists to stop the team and look and listen for an approaching train, and the evidence in this case is that the driver of the bus did not stop.

"If you find that the driver by stopping, looking and

listening could have heard the approach of the train but did not do so, and that his failure to stop, look and listen caused the injuries complained of, then the acts or omissions of defendant company were not the proximate cause of the injuries and there can be no recovery against the defendant company in that case, unless you find that the plaintiffs themselves could have taken steps to avoid the accident had the defendant company performed its duty with regard to such crossing."

The new trial was granted solely because of the giving of this instruction. The trial court conceived that in giving the instruction it had imputed the negligence of the driver of the stage to the plaintiffs, who were only passengers for hire therein and had in no manner contributed to such negligence. That such is the import of the instruction cannot be gainsaid. The jury are directly charged that if they find that the driver did not stop, look, and listen for an approaching train, and that his failure to do so caused the injuries to the plaintiffs complained of, then the plaintiffs cannot recover from the railroad company, unless the jury further find that the plaintiffs themselves could have taken steps to avoid the accident had the railroad company performed its duty with regard to the crossing. This instruction plainly makes the plaintiffs responsible for the negligence of the driver of the stage. That such is not the rule has been heretofore held by this court, and is the weight of authority generally. *Shearer v. Buckley*, 31 Wash. 370, 72 Pac. 76; *Wilson v. Puget Sound Elec. R.*, 52 Wash. 522, 101 Pac. 50, 132 Am. St. 1044; *Cathey v. Seattle Elec. Co.*, 58 Wash. 176, 108 Pac. 443; *Bennett v. New Jersey R. & Trans. Co.*, 36 N. J. L. 225; *New York etc. R. Co. v. Steinbrenner*, 47 N. J. L. 161, 54 Am. Rep. 126; *Dyer v. Erie R. Co.*, 71 N. Y. 228; *Little v. Hackett*, 116 U. S. 366.

In the latter case it appeared from the record that plaintiff, who was on an excursion from his home to a neighboring town, hired a hackney-coach from a stand near a hotel at the latter place and was driven to a railroad station,

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where he expected to take a train back to his home. On arriving there he found he had time before the train left to take a further drive, and directed the driver to go through a park which was near by. The driver thereupon turned the horses to go to the park, and in crossing the railroad track near the station for that purpose, the carriage was struck by the engine of a passing train, and the plaintiff received the injury complained of. The carriage belonged to a livery stable keeper and was driven by a person in his employ. It was an open carriage, with the seat of the driver about two feet above that of the persons riding. The evidence tended to show that the accident was the result of the concurring negligence of the managers of the train and of the driver of the carriage—of the managers of the train in not giving the usual signals of its approach by ringing a bell and blowing a whistle, and in not having a flagman on duty; and of the driver of the carriage in turning the horses upon the track without proper precautions to ascertain whether the train was coming. The defense was contributory negligence in driving on the track, the defendant contending that the driver was thereby negligent, and that his negligence was to be imputed to the plaintiff. The trial court charged the jury to the contrary, and the court discussing the question said:

“To determine, therefore, the correctness of the instruction of the court below—to the effect that if the plaintiff did not exercise control over the conduct of the driver at the time of the accident he is not responsible for the driver’s negligence, nor precluded thereby from recovering in the action—we have only to consider whether the relation of master and servant existed between them. Plainly, that relation did not exist. The driver was the servant of his employer, the livery-stable keeper, who hired out him with horse and carriage, and was responsible for his acts. . . .

“Cases cited from the English courts, as we have seen, and numerous others decided in the courts of this country, show that the relation of master and servant does not exist be-

tween the passenger and the driver, or between the passenger and the owner. In the absence of this relation, the imputation of their negligence to the passenger, where no fault of omission or commission is chargeable to him, is against all legal rules. If their negligence could be imputed to him, it would render him equally with them responsible to third parties thereby injured, and would also preclude him from maintaining an action against the owner for injuries received by reason of it. But neither of these conclusions can be maintained; neither has the support of any adjudged cases entitled to consideration."

The appellant argues that the last clause of the instruction relieves it of the error contained in the earlier part. But the plaintiffs had no control over the driver of the stage. They had nothing to do but follow the driver's directions, and if it was the concurring negligence of the driver of the stage and the railway company that caused the injuries, the liability therefor attaches to them jointly and severally, even though the jury should find that the plaintiffs could not have avoided the accident had the railway crew given warning of the approach of the train. *East Tennessee etc. R. Co. v. Markens*, 88 Ga. 60, 13 S. E. 855.

Lastly, the appellant contends that the instruction, if error, is harmless when considered with reference to the other instructions and the evidence in the case. But we think the error prejudicial in whatever light it is viewed, and that the trial judge correctly so ruled.

DUNBAR, C. J., GOSE, and MOUNT, JJ., concur.

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Opinion Per Curiam.

[No. 9517. *En Banc*. August 8, 1911.]

JAMES T. WENTWORTH, *Appellant*, v. JOHN R. MOORE *et al.*,
Respondents.¹

ATTACHMENT—DISSOLUTION—FAILURE TO GIVE BOND—CONDITION PRECEDENT. On motion to dissolve an attachment erroneously issued without a bond, leave to file a bond is properly denied, the statute making the filing of a bond a condition precedent to an attachment.

Appeal from an order of the superior court for King county, Sheeks, J., entered January 31, 1911, discharging an attachment, after a hearing before the court. Affirmed.

Geo. D. Emery (*W. D. Covington*, of counsel), for appellant.

Reynolds, Ballinger & Hutson, for respondents.

PER CURIAM.—This is an appeal from an order dissolving an attachment. Plaintiff, at the time of filing his complaint, filed an affidavit for a writ of attachment to be levied on real estate only, alleging, among other things, that the defendants were nonresidents. The writ was issued and levied upon the real estate referred to. The defendants entered their appearance, and moved to vacate and quash the writ of attachment on the ground that the defendants were residents of the state of Washington prior to, at the time of, and subsequent to the issuance of the writ. This question was tried out on affidavits furnished by both parties, and the court found that the defendants were residents of the state, and decreed the dissolution of the attachment. We have read the affidavits and do not feel justified in disturbing the findings of the court in that regard. The plaintiff then offered to file a bond, which offer we think was properly denied by the court, the statute making the execution and filing of a bond a condition precedent to the issuance of the writ. The

¹Reported in 117 Pac. 251.

question objected to by defendants, which objection was sustained by the court, was irrelevant and immaterial, as it did not touch on the subject of residence; and without a bond the attachment should not have issued.

The judgment is affirmed.

[No. 9519. Department Two. August 8, 1911.]

BURTON W. KALBERG, *by his Guardian etc., Respondent*, v.

THE BON MARCHE, *Appellant*.¹

WITNESSES—QUALIFICATIONS—AGE—DISCRETION. Whether a boy nine years of age is competent to testify to an occurrence that happened three years previously, rests largely in the discretion of the trial judge, and admission of his testimony will not be disturbed when no abuse appears, and the jury were properly instructed as to its weight and their right to disregard it if they believed that he was testifying to his belief from suggestions rather than from an actual remembrance of the facts.

TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT. A statement of an attorney in argument that he was thoroughly convinced from the facts proven of a certain fact in issue is nothing more than a conclusion and not misconduct requiring a reversal.

DAMAGES — PERSONAL INJURIES — EXCESSIVE VERDICT. A verdict for severe personal injuries will not be set aside as excessive where there was no indication of passion or prejudice, and the discretion of the jury was not abused.

Appeal from a judgment of the superior court for King county, Main, J., entered November 4, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor run over by a wagon. Affirmed.

Harold Preston and E. M. Carr, for appellant.

Jackson Silbaugh, for respondent.

DUNBAR, C. J.—The respondent, Burton W. Kalberg, a minor, brought this action by his guardian *ad litem*, John E.

¹Reported in 117 Pac. 227.

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Opinion Per DUNBAR, C. J.

Kalberg, against the appellant, for damages for injuries alleged to have been sustained by Burton W. Kalberg by reason of his having been run over in a certain street or alley in the city of Seattle by a wagon belonging to the appellant, and driven by one of its drivers while engaged in the business of his master. Trial was had, and a verdict was rendered by the jury in favor of the respondent in the sum of \$1,500. Motion for new trial was overruled, judgment was entered on the verdict, and from such judgment, this appeal is taken.

The first assignment is that the court erred in permitting the witness Vern Dean to testify over appellant's objection. Vern Dean was nine years old at the time of the trial, and the accident had occurred nearly three years prior to that time; and it is seriously urged by the appellant that the court should have held, as a matter of law, that the Dean boy could not, in the very nature of things, give upon the witness stand any account of the facts and circumstances connected with the injury of the plaintiff sufficient in law to base a verdict upon; especially by reason of the fact that so long a time had elapsed between the incident testified to and the time of the trial, and that his memory must have been aided by suggestions occurring during that interval. It is so well established that the permitting or refusing to permit a child to give testimony in an action at law rests largely in the discretion of the trial judge, that it is scarcely worth while to cite authorities on that question. It was said by this court, in *State v. Bailey*, 31 Wash. 89, 71 Pac. 715, that the capacity of a witness of tender years is a question for the discretion of the trial judge, and will not be disturbed except in cases of manifest abuse of discretion; citing 16 Am. & Eng. Ency. Law (2d ed.), page 270, where the cases on this question are collated. In the same volume, at page 268, it is said:

"Intelligence and not age is the proper test by which the competency of such witnesses must be determined; and where

it appears that an infant has sufficient intelligence to receive just impressions of the facts respecting which he is to testify, and sufficient capacity to relate them correctly, and has received sufficient instruction to appreciate the nature and obligations of an oath, he should be admitted to testify, no matter what his age."

This general rule is conceded by the appellant, but it is insisted that the circumstances in this case take it out of the rule. It does not necessarily follow that the memory may not be properly aided by suggestion during the interval elapsing between the occurrence of an accident and the time when the testimony is given. It must be true that the frequent dwelling of the mind upon a circumstance known, or an incident observed or experienced, will tend to strengthen the memory and aid the recollection; just as one who had talked about a circumstance frequently, and recalled it, would be more liable to recollect it correctly.

But if the appellant's contention is true, that phase of the case was covered by the instruction of the court to the jury in the following words:

"In addition to the other instructions I have given you regarding the weight to be given to the testimony of witnesses who appeared and testified before you, I instruct you that where a witness of tender years testifies to his recollection of an occurrence which took place several years before the time of giving the testimony, you have the right in considering such testimony, to consider the age of the witness, the length of time which has elapsed since the date of the occurrence regarding which he testifies, his ability to remember other facts or circumstances regarding such occurrence than the ones he testifies regarding, and his ability to remember other matters occurring about the same time, and from all those considerations to determine what weight is to be given to the testimony of such witness. If you should believe that such witness while testifying to what he believed to be the truth has in fact testified not to an actual present remembrance of what took place but what he believes from suggestion or from hearing others discuss the occurrence to be the truth, you have a right to and should disregard the testimony."

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We have read carefully the examination of this witness by the court and by the attorneys, and are convinced that the court did not abuse its discretion in permitting the child to testify, and that, under the instructions of the court, the testimony was properly submitted to the jury.

This also disposes of the second assignment of error, viz., that the court erred in denying appellant's motion that the testimony of the witness Vern Dean be stricken from the case and the jury be instructed to disregard it. There seems to be no merit in the third assignment of error, viz., the action of the court in denying appellant's motion for nonsuit. There was sufficient legal testimony, if believed by the jury, to sustain the verdict.

Appellant assigns error of the court in refusing to give certain instructions asked for, but those assignments do not appeal to us as being meritorious. The court correctly instructed the jury on the general principles of law applicable to the case, and that was sufficient.

It is also contended that the attorney for the plaintiff was guilty of misconduct in his argument to the jury. The record shows that the attorney for the plaintiff stated that "from the facts proven, I am as thoroughly convinced as anything in the world that the defendant's wagon ran over the child in the manner stated." We think this was nothing more than the statement of a conclusion from deductions made from the testimony, and that the jury could not have understood from the statement of counsel that he was intending to testify in the case.

It is also seriously contended that the verdict is excessive, and that it is the product of passion and prejudice on the part of the jury. From the history of this injury as found in the record, we are unable to adopt this view. There would seem to be no particular reason why passion and prejudice should exist in this case, the defendant being in the mercantile business in the city of Seattle. That the child was seriously injured appears from the testimony of the witnesses for the

defense as well as from the witnesses of the plaintiff. It is said by Thompson, in his Commentaries on the Law of Negligence, vol. 6, § 7348:

“The quantum of damages to be allowed in an action of tort is a matter peculiarly within the province of the jury, and especially is this the case with personal injuries where the law fixes no precise rule of damages. . . . ‘It is only where verdicts are palpably against evidence, or obviously the result of passion or prejudice, that courts are permitted to interfere upon the ground that the verdict is excessive or unauthorized by the facts.’ ‘The damages assessed by the jury may have been greater than the court would have awarded upon the evidence. But the parties are entitled to the judgment of the jury, and not of the court, upon that question; and courts will not set verdicts aside on the ground that damages are excessive or inadequate, unless it is apparent that the jury acted under some bias, prejudice, or improper influence, or have made some mistake of fact or law; mere difference of judgment is not sufficient.’ ‘The court cannot substitute its own sense of what would be proper for the verdict of the jury.’”

An examination of all the testimony in this case convinces us that the discretion of the jury in this regard was not abused. The cause was fairly tried and submitted upon proper instructions.

The judgment will therefore be affirmed.

CROW, CHADWICK, MORRIS, and ELLIS, JJ., concur.

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Opinion Per MORRIS, J.

[No. 9340. Department Two. August 8, 1911.]

METHOW CATTLE COMPANY, *Appellant*, v. W. E. WILLIAMS
et al., *Respondents*.¹

WATERS AND WATER COURSES—CONTRACTS—RIGHT OF WAY FOR DITCH—PAROL LICENSE—REVOCATION—WHO MAY QUESTION. Where the owner of lands gave a right of way for a ditch in consideration of an agreement for water for irrigation purposes, the water to be taken out on his own land, the owner of the ditch cannot defeat such taking and use by invoking the rule that permission to maintain the ditch was revocable at will as a parol license, or void as attempting to create an interest in lands by parol, within the statute of frauds; since the water in the ditch was subject to an agreement for its use as any other personal property.

PUBLIC LANDS—HOMESTEAD—ALIENATION—GRANT OF USE FOR WATER DITCH. The grant of a right of way for a ditch across public lands in possession of a homesteader before final proof, in consideration of the right to take and use water from the ditch, is not an alienation of the land within the purview of U. S. Rev. St. § 2288; and the owner of the ditch cannot invoke the rule that the contract for water was void as against public policy, in order to defeat the taking and use of the water pursuant to the contract.

WATERS AND WATER COURSES—IRRIGATION—USE—RELIEF. Equity will not, at the suit of a riparian owner, restrain the use of water diverted from a creek and required for irrigation by an adjoining owner, where ample water is left for all uses of the riparian owner, who suffers no damage from the diversion complained of.

Appeal from a judgment of the superior court for Okanogan county, Taylor, J., entered August 22, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action to enjoin the use of the waters of a creek for irrigation purposes. Affirmed.

Smith & Gresham, for appellant.

Burton & Jennings, for respondents.

MORRIS, J.—This is a controversy involving the rights of the parties to the use of a water ditch, for the flow of water

¹Reported in 117 Pac. 239.

from Beaver creek in Okanogan county, for irrigation of their respective lands. The lands of the appellant are riparian to Beaver creek; those of respondent are not. This is, however, of no determinative value to the issues involved. The lands of appellant are situate in sections 2 and 11; those of respondent in sections 12 and 13; all in same township and range; so that respondents' lands lie in a generally southeasterly direction from appellant's. Respondents settled upon their lands in 1896 and, in the same year, they surveyed a ditch from a point on Beaver creek in the southwest quarter of section 2, across section 11 and over and upon their lands, for the purpose of conveying water from Beaver creek to their lands for irrigation purposes and domestic use. In the same year J. A. Stewart, seeking water for power purposes in the operation of the Red Shirt mine, surveyed and built the ditch in question, known as the Red Shirt ditch. This ditch tapped Beaver creek at the same point as the ditch previously surveyed by respondents, and followed the same general direction down to and over the lands of appellant and respondents. All these lands were unsurveyed public lands at the time, not yet having been thrown open to private entry, although in the possession of respondents and the grantors of appellant, to whom the lands were subsequently respectively patented, all of whom consented to the appropriation of water by Stewart.

The consideration for the right of way of this ditch, over the lands of respondents and those now owned by appellant, was the right to take therefrom and use water for irrigation purposes; respondents further agreeing to keep the ditch in proper repair across their premises. Respondents, upon making this agreement with Stewart, abandoned their ditch, and Stewart built the Red Shirt ditch, putting in diversion gates upon respondents' lands to enable them to take water therefrom. Respondents have continually used water from this ditch for irrigation and domestic purposes, and have assisted in keeping the same in repair from 1896 up to the

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present. The Red Shirt mine was abandoned later, and the ditch and its water rights have been conveyed to appellant, and this action has been instituted by it to enjoin respondents from any use of the ditch or the waters of Beaver creek. The court below has made extensive findings, all of which, in so far as they are determinative of the issue, are excepted to by appellant. We cannot, however, review them in this opinion. It is sufficient to say we find them sustained by the record, and as they are made upon sharply contested facts, we accept them as our findings, following the rule so oft announced in cases of this character.

Appellant raises several questions of law which we will now consider. It contends that the right to the use of the ditch and its waters is, in effect, a parol license, creating or attempting to create an interest in land, and hence within the statute of frauds and controlled by *Hathaway v. Yakima Water Power Co.*, 14 Wash. 469, 44 Pac. 896, 53 Am. St. 847, and *Rhoades v. Barnes*, 54 Wash. 145, 102 Pac. 884, both of which hold that a parol license, to be exercised upon the land of another, creates an interest in land and is within the statute of frauds, and revokable at any time irrespective of any performance under the license. We still so hold. But such rule has no application here. The land, as between the parties to the agreement, Stewart and respondents, was the land of respondents; and when Stewart permitted him to take water from the Red Shirt ditch, in payment of a right of way across the lands, and in further consideration of keeping the ditch in repair, it was in no sense the granting of a license to be exercised upon the land of another. The lands were the lands of respondents, and no agreement with Stewart could create in respondents any license or interest to be exercised upon their own lands. If the positions were here reversed, and respondents sought to prevent the maintenance of this ditch across their lands, the rule contended for by appellant might prove a defense in respondents to the assertion of the original parol agreement. Such, however, is not

the case, and such a doctrine is not suggested here by any one entitled to raise it. Water is sometimes held to be real estate, and to pass by grant as the right of a riparian owner to the natural flow of a stream across his lands, a right so inseparably annexed to the soil as to pass with it, not as an easement or appurtenance, but as part and parcel of the land itself. *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107.

But we have no such situation here, and are not dealing with riparian rights, nor the flow of waters in their natural channel. Water in an artificial ditch is private and personal property, and as such, is subject to an agreement for its sale or use as is any other kind of personal property. Wiel, *Water Rights*, § 154. There is no legal barrier to an exchange of water for a right of way for a ditch, and the water so agreed upon is as much the property of the person to whom it is given as the money that paid for the right of way, if so purchased.

It is next said that this water was taken by Stewart for power purposes, and under the rule announced in *Cascade Public Service Corporation v. Railsback*, 59 Wash. 876, 109 Pac. 1062, that the alienation by a homesteader before final proof, of a right of way for a water flume to convey water for power purposes, is void as not within the rights of alienation granted under homestead settlement. Here, again, appellant is seeking to set up a defense for respondents, should respondents question the right to maintain this ditch across their lands. But no such question is here made an issue, nor are respondents seeking to deprive this ditch of its right of way across their lands. Rather are they seeking to maintain it, and it would hardly be equitable to use as a club against them that which was granted as a shield for their protection. Nor could the question of public policy of such a rule be here invoked, as the right of way is not here made the basis of any right of action. In any event, the permission to cross respondents' lands without cost other

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than the use of water was in no sense an alienation of land, and hence not within the purview of U. S. Rev. Stats., § 2288, which furnishes the basis for the rule announced in the *Rails-back* case; since the ownership of the ditch includes no ownership of the soil, nor of any fee in the land, but consists only of a right of way over the land. *Wiel, Water Rights*, § 151.

As between the parties hereto, there is no scarcity of water in this ditch. Each can obtain ample for his needs, and each is, by the decree of the court below, awarded all the water required for irrigation; the appellant, by reason of its riparian rights on Beaver creek, being given the priority. It is, therefore, difficult to discover how respondents' use of the ditch and its waters does any damage, irreparable or otherwise, to appellant. So far as the parties now before us are concerned, we see no denial of equity in the rights to the ditch and its waters as fixed in the decree.

Other questions are suggested, but we do not think it necessary or useful to discuss the matter further. The judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9190. *En Banc*. August 10, 1911.]

WILLIAM K. NOBLE, *Appellant*, v. OLYMPIA BREWING
COMPANY, *Respondent*.¹

SALES — RESCISSION BY VENDEE — WAIVER — DILIGENCE — USE OF GOODS. The right to rescind a sale of a car load of elm hoops and liners for breach of warranty as to quality is waived, and the purchaser cannot use a part and tender pay for the part used, in defense of an action for the price, where, on receipt of the shipment, objection was made to the quality and a twenty-five per cent deduction from the invoice price claimed, which claim was promptly disallowed by the seller, who directed the purchaser to notify by wire immediately if the stock could not be used, which the purchaser failed to do, but during several months used a large per-

¹Reported in 117 Pac. 241.

centage of the shipment under continual claims for credit on account of breakage; since diligence in returning or offering to return the goods is essential.

DUNBAR, C. J., CHADWICK and GOSE, JJ., dissent upon the facts.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered June 30, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action on contract. Reversed.

King & King, for appellant.

G. C. Israel, for respondent.

CROW, J.—This action was commenced by William K. Noble against Olympia Brewing Company, a corporation, to recover \$945.49, remainder of purchase price on a carload of merchandise. Judgment was entered in plaintiff's favor for \$176.20, less \$37.60 costs awarded to the defendant. The plaintiff has appealed.

The evidence shows that, on or about February 5, 1907, appellant sold respondent a carload of elm hoops and liners to be delivered f. o. b. at Olympia, Washington; that, after much delay, claimed by appellant to have been caused by inability to obtain a suitable car, the shipment was made from Columbus, Ohio, and reached Olympia, Washington, on or about May 3, 1907. On May 11, 1907, respondent wrote appellant the hoops and liners were of inferior quality, and requested a memorandum credit of 25 per cent on the invoice price to cover its alleged loss. Appellant promptly refused this request, contended the goods were first-class, and insisted upon full payment. Respondent, by way of affirmative defense, alleged the goods were guaranteed; that, relying upon such guarantee, it paid \$454.75 freight charges, unloaded the car and discovered the goods were of inferior quality, a fact that could only be definitely ascertained by using a portion of them; that respondent notified appellant of the condition of the hoops and liners, and refused to ac-

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cept them except at a discount; that when respondent ordered the hoops, appellant agreed to ship promptly, but failed to do so; that by reason of appellant's delay, respondent was without hoops or liners for use in its business, and was compelled to commence using the shipment; that in so doing it discovered their inferior quality; that appellant has refused, and still refuses, to accept a return of the goods; that respondent now holds, subject to appellant's order, 38,080 6-6 elm hoops, 10,000 6-0 elm hoops, and 40,000 liners, which are without value to respondent; that while attempting to adjust its demands, respondent used 15,000 of the 6-0 elm hoops, 30,000 of the 6-6 elm hoops, and 10,000 liners; that in doing so it sustained a loss of 15 per cent thereon; that the hoops and liners so used were of no greater value than \$612.75; that respondent has paid thereon \$454.75, the freight charges; that there remains due appellant therefor \$158, which respondent tendered in court with \$18.20 accrued interest and \$16.20 costs, or \$192.40 in all. The jury returned a verdict in appellant's favor for \$176.20.

Appellant's controlling contention is that, from the allegations of the answer and undisputed written evidence, it clearly appears there was no rescission of the contract, and that by receiving the car and using the quantity of hoops and liners alleged in the answer, respondent not only waived its right to rescind, but also accepted the entire shipment. Making this contention, appellant requested the following instruction, which was refused:

"The defendant alleges in its answer, that after using the portions of the hoops and liners as referred to heretofore, it tendered back to the plaintiff, the remaining portions of said hoops and liners, and offered to pay for those portions used, at the contract price, less 15% for breakage, which offer the plaintiff rejected, and you are instructed that the plaintiff had a right to reject this offer, and it did not constitute a defense to this action for the reason that, by using the considerable portion of the hoops and liners that it did, the defendant waived its right to rescind the contract for a

breach thereof, as to the quality of the hoops and liners, if there was any such breach, and bound itself to take all the hoops and liners, and pay for the same."

Instead of giving this instruction, the trial judge submitted to the jury for its determination the question whether there had been an acceptance or a rescission by respondent. There is nothing in the record sufficient to show that respondent at any time made a positive and unconditional declaration of its election to rescind, or that it tendered a return of the goods prior to the filing of its answer. In making this statement we are not unmindful of respondent's letters to appellant. On May 11, 1907, it wrote appellant it would not accept the goods unless appellant conceded a credit of 25 per cent on the invoice price, which appellant promptly refused. Much correspondence ensued, throughout all of which respondent contended the goods were of inferior quality, while appellant contended they were first-class. This correspondence continued from May, 1907, until the following December without satisfactory results. During this time respondent used in its business a large portion of the hoops and liners, the amount being alleged in its answer. It is fallacious to argue that it could continue using the goods and at the same time rescind the order, or that it was necessary for respondent to use so large a percentage for the sole purpose of ascertaining their quality, while respondent at the same time reserved to itself the right to rescind. Respondent's first letter written after the arrival of the car, dated May 11, 1907, reads as follows:

"We have received the car of hoops which you sent us and are now using them. We wish to state that we are exceedingly disappointed in the quality of stock sent us as the breakage of these hoops average 25%, caused from not being first class stock. The head liners are in about the same condition and we are mailing you a sample of them to show you what we actually received. Had we known that this car of stock would turn out so poor we would not have received it. As you promised us that you would send us

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strictly No. 1 stock we expected to receive it. We must insist upon your sending us a credit memorandum for 25% of the amount of your invoice to cover our loss on this shipment. We will make no settlement any other way, so hope to be favored with your credit by return mail so as to make settlement."

This language indicates an election, intention, and willingness to accept and use the goods at a reduced price. On May 16, appellant answered, refusing the requested credit, saying:

"Wish to say that we cannot entertain any thoughts of allowing you to deduct twenty-five per cent from the face of our invoice, as, if you cannot use this car as per invoice rendered you, wish you would kindly wire us immediately upon receipt of this letter."

Respondent did not wire as requested, but on May 24 wrote another letter in which it evidenced its continued use of the hoops and liners by making the following statement:

"Each cooper is keeping a daily report of the number of hoops broken which they mark on their time slips. Will you take their count as rendered or if you want, we can have them make sworn statement and you are to allow us for breakage less 3% which we believe to be a liberal allowance for first class stock. You surely cannot expect us to stand this loss alone and we are willing to work the stock up on this basis. This way, we believe will be a square deal to us both. We believe that this way of adjusting this matter would be more preferable and profitable to you than going to the expense of reloading and paying freight to some other point."

Respondent did not act diligently in refusing the shipment, but continued its use of the stock. Its letters indicate that it needed the stock, and that it used a large percentage for that reason. If goods are purchased under a guaranty of quality, and upon examination do not measure up to the guaranty, the vendee, for his protection, has an election of two remedies. He may, upon discovery of the inferior quality, with due diligence and without unnecessary delay, rescind

the contract, return or offer to return the goods, and proceed against the vendor for his damages sustained, or he may retain the goods and recover his damages, either in an action prosecuted by himself for that purpose, or by recoupment in an action for the purchase price prosecuted by the vendor. *Seattle Nat. Bank v. Powles*, 33 Wash. 21, 73 Pac. 887.

In *Cream City Glass Co. v. Friedlander*, 84 Wis. 53, 54 N. W. 28, 36 Am. St. 895, 21 L. R. A. 135, a vendee claimed a shipment of soda ash was not suitable for the purpose intended, and so notified the vendor. Thereafter he used six tierces out of sixty-three shipped, and then attempted to rescind the contract of sale and recover the purchase price which he had paid. In reversing a judgment in his favor the supreme court of Wisconsin said:

“Now, in this case the plaintiff’s officers determined at once, and upon inspection alone, that the material was unfit for their purposes, and so notified the defendant, and rejected the entire lot. They did not claim to need any test. They took their position definitely. After that act they could not deal with the property in any way inconsistent with the rejection, if they proposed to insist upon their right to reject. *Churchill v. Price*, 44 Wis. 540. They must do no act which they would have no right to do unless they were owners of the goods. Benjamin, Sales, 6th ed., § 703. Under these rules it is evident the plaintiff had no right to use up a quantity of the material several weeks after the rejection. By the rejection it became defendant’s property, if such rejection was rightful. Plaintiff had no right to use any part of it. It is claimed that the use was simply for the purpose of providing evidence of unfitness for the purposes of the trial of this case; but one has no right to use his opponent’s property for the purpose of making evidence. The act was an unmistakable act of ownership, and entirely inconsistent with the claim that the material had been rejected, and was owned by defendant.”

Here the respondent not only claims a rescission, but offers to return only about one-half or a little more of the shipment. Applying the law to the undisputed facts which appear in the written correspondence, we are compelled to hold that,

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by using an excessive and unnecessary percentage of the goods, respondent not only accepted them, but also waived its right to rescind. The trial court erred in submitting to the jury the issue of acceptance or rescission. If the respondent has suffered damages it is entitled to recoup them in this action, and for that purpose may amend its pleadings if it so desires.

The judgment is reversed, and the cause remanded for a new trial.

MORRIS, PARKER, MOUNT, ELLIS, and FULLERTON, JJ.,
concur.

CHADWICK, J. (dissenting).—The quality of the goods involved in this case could be determined only by actual test. When they were put to this, it was found that they were deficient in quality. But whether they were in fact unfit for the uses intended became immaterial, as will be made to appear. The fact that the goods were inferior in quality was immediately called to the attention of appellant, and the subsequent correspondence between the parties shows that respondent did not continue to use the goods intending to rescind, but did so at the request of appellant and under an assurance that in the end it would be found that the breakage did not exceed five per cent. Under such circumstances respondent had a right to use the stock. Finally, after a fair test, respondent notified appellant that it still found “the percentage to be very much greater than we can stand. We cannot see our way clear to accept the shipment at the face of the invoice. If you can arrange to have some one take the remaining stock off our hands, please do so, and send us shipping instructions and then we will arrange for the loading and shipping to whom you want sent.”

After some correspondence as to the amount of the stock that had been used, respondent proposed to replace enough to make up a carload, and to ship it subject to appellant's order. It was finally agreed that the differences between the parties would be settled by respondent shipping to appel-

lant's order at Aberdeen a carload of stock. Under date September 16, appellant wrote as follows:

"In further reference to our favor of the 6th inst., wish you would either ship us a carload of hoops and liners . . . or send us your check in full as per the invoice we sent you. Also let us know by return mail as to what you are going to do, so we can govern ourselves accordingly. Ship the car to W. K. Noble, at Aberdeen, Washington."

On September 26, respondent notified appellant that it had made a rush order for a car from the east, and that the car had been forwarded on September 20 from some place in Michigan. Notwithstanding this offer and its acceptance, appellant wrote respondent on October 2, saying:

"I have your favor of the 26th, and our customer at Aberdeen cannot wait indefinitely for his shipment of hoops, and our account, we think, can be collected very easily."

And on October 14 appellant wrote, saying:

"I have your favor of the 8th, and our customer at Aberdeen could not wait any longer for the stock, and we had to make prompt shipment or lose his order, and his car has now gone forward. We would have taken this stock if we could have gotten it promptly. But to wait on your car to arrive from the east and when it might be on the road three or four weeks would be an injustice to our customer."

The fact that appellant, agreeably to the understanding had between the parties, had shipped a car on September 20, gives the lie to the assertion of appellant that his customer at Aberdeen could not wait for an indefinite time, or until a car might arrive from the east. The record shows that, whether the goods were shipped by appellant or by respondent, they had to be ordered in the east, and to a minority of this court, at least, it seems more reasonable to suppose that a car leaving Michigan on September 20 would reach Aberdeen before a car leaving Indiana some time in October would arrive at the same destination.

The crux of this case lies in this: After due trial at the solicitation of appellant, the goods were found to be unfit.

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Thereafter a new contract was entered into, and when respondent had entered upon its performance in good faith, appellant repudiated it. Not only repudiated it, but did so in bad faith; for on respondent's letter of the 26th of September, we find a notation which was carried into the letter of October 2d quoted above: "our account can be collected very easily." So, after all, it may be plainly seen that the financial responsibility of the respondent was the temptation which moved appellant to his repudiation and is the inspiration of this lawsuit. The law of rescission is in no sense involved. That question was eliminated, if it was ever in the case, by the subsequent agreement of the parties, and all instructions, or the refusal of the court to give instructions on the subject of rescission, would be immaterial error, for the court instructed not only upon appellant's theory, but upon the case as we have outlined it, and the jury has found, under proper instructions, that appellant was at fault. That being so, respondent was liable for that part of the stock which it had used while negotiations for a settlement were pending, and no more. The verdict of the jury should stand.

DUNBAR, C. J., and GOSE, J., concur with CHADWICK, J.

[No. 9553. Department One. August 10, 1911.]

OSCAR P. ATWOOD *et al.*, *Respondents*, v. GRANT SMITH
et al., *Appellants*.¹

MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CHANGE—AUTHORITY OF CITY ENGINEER—RIGHTS OF PARTIES. Under a clause in a contract authorizing a city engineer to make such changes in the plans for a public improvement as the successful prosecution of the work may require, he is not authorized to radically change the slope of the excavations not necessary to correct any structural defects, but made merely to change the cost of the assessment, the property owners having specified in their petition for the improvement a specified slope, which the ordinance adopted, and damages to property owners having been awarded on that basis as well as private contracts for reducing lots to street level entered into; hence such contracts must be performed on the original basis, and contractors left to a remedy by reassessments.

SAME—CHANGE IN PLANS—DEFICIENCY IN FUNDS—APPORTIONMENT—BENEFITS. A deficiency in the sums collected on a public improvement cannot be made up by a radical change in the plans, throwing a larger per cent of the cost of excavations upon owners excavating their own lots to street level by private contract, but only by apportionment upon all the property according to benefits.

SAME—CHANGE IN PLANS—RIGHT TO OBJECT—ESTOPPEL. A party is not estopped to question an invalid change in the plans for a public improvement, when notified thereof by the contractor, where he did not mislead the contractor into the belief that he would assent, and shortly after notified him that the matter would be investigated before assent would be given.

SAME—CONTRACT—DETERMINATION OF DISPUTES. A clause in a contract between a city contractor and owners, to the effect that all disputes shall be decided by the city engineer, has reference only to disputes arising under the contract, and not to matters clearly not covered by the contract.

Appeal from a judgment of the superior court for King county, Albertson, J., entered October 13, 1910, in favor of the plaintiffs, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

¹Reported in 117 Pac. 393.

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Opinion Per FULLERTON, J.

Todd, Wilson & Thorgrimson, for appellants.*James Kiefer*, for respondents.

FULLERTON, J.—On May 12, 1906, certain persons, among whom was the respondent Oscar P. Atwood, owning platted property on what is known as Denny Hill in the city of Seattle, petitioned the city council of that city to cause the streets and alleys therein to be improved by widening certain of the streets and grading all of them to stated elevations above a named datum line. The petition was minute in its details, and specified the angles of the slopes for both fills and cuts, requiring the latter to be constructed with a side slope of 1 to 1, that is, a slope of 1 foot laterally for each 1 foot of vertical cut. It also contained a proviso to the effect that the city on letting the contract for the work should insert therein a condition requiring the contractor to excavate the private property of the several owners to a level with the street in its front at a cost per cubic yard not to exceed the sum bid by the contractor for excavating the streets. Acting pursuant to the petition, the city passed an ordinance widening certain of the streets and establishing grades of the streets and alleys in the district described, following the recommendations of the petition in detail, and requiring in terms that the cuts should have a slope of 1 to 1. It also instructed the corporation counsel to begin condemnation proceedings against the owners of the property affected by the improvement “so that just compensation might be made for the property and property rights taken or damaged by reason of . . . the grading and regrading of the” streets and alleys in conformity with the requirements of the ordinance. Condemnation proceedings were thereupon begun by the corporation counsel, and damages ascertained and awards made on the basis that the improvement would be made as prescribed in the ordinance.

Thereafter, on December 3, 1906, an ordinance was passed directing that a contract be let for making the improvement.

This ordinance did not set forth the details of the work, but provided that it should be made according to the plans and specifications prepared under the direction of the city engineer on file in the office of the department of public works of the city of Seattle. These plans and specifications described the work in detail, and in them it was provided that the side of the cuts should be made with a 1 to 1 slope. The contract was let pursuant to the ordinance on August 17, 1907, to the Rainier Development Company, at a price of 27 cents per cubic yard for all earth excavated. It was also expressly provided in the contract that the contractor should excavate such of the abutting property as the owners thereof should require to a level with the street fronting upon such property at the same rate per cubic yard that was charged for excavating the street. The contract did not set forth the detailed plans of the work, but provided that it should be done in "all respects in accordance with the plans now on file in the office of the city engineer of said city, and the specifications and general stipulations hereto attached." The plans mentioned seem to have been duplicates of the plans on file with the department of public works, referred to in the ordinance directing the contract to be let. The general stipulations attached to the contract contained the following provisions:

"All materials and labor shall be furnished and placed in accordance with the following detailed specifications and the accompanying general and detailed plans of this improvement, which are hereby made part of these specifications. Said plans and specifications are subject to such changes, additions or instructions as the city engineer may require to furnish or deliver before the beginning or during the progress of the work. The side slopes shall be made as shown on the plans or as directed by the city engineer. To prevent all disputes and litigation it is further agreed by the contractor that the city engineer shall in all cases determine the amount of work to be paid for under the contract for this improvement, and his estimates and decisions

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shall be final and conclusive, subject to the approval of the board of public works."

On September 28, 1907, an assessment roll was prepared and filed with the city comptroller. In this roll all the property of the district was assessed as benefited by the improvement, irrespective of the fact whether or not the owner thereof had been awarded damages in the condemnation case, and on its face provided for a sufficient sum of money to pay the cost of the excavation required by the contract, calculating the amount thereof on a basis of a 1 to 1 slope for the sides of the cuts.

The Rainier Development Company thereafter assigned their interests in the contract to the appellants, Grant Smith & Company and Stillwell, who on November 9, 1908, entered into a contract with the respondents Atwood, agreeing to excavate certain described property belonging to them as owners to a level with the street on which it fronted. The contract refers specially to the contract between the city and the appellants' assignors, reciting that the owner desires to and does ratify and adopt the action of the city council in entering into such contract and further desires to obtain the benefits thereof, and then provides that the contractor shall excavate the described property at a cost to the owner of 27 cents per cubic yard for all earth excavated and removed. No specific quantity of earth to be removed is mentioned in the contract, nor does it refer in any manner to the character of the slopes. An estimate was made of the quantity of earth to be removed by the engineer of the contractors, at the time the contract was signed and handed the owners. This estimate was calculated on the basis that the city would excavate the full width of the street and back upon the property of the owner the necessary distance to make a 1 to 1 slope for the side of the cut, the amount of the estimate being 19,618 cubic yards. The contract also contained the following provision:

"All measurements of earth shall be made by the chief

engineer of the contractors and his measurements shall be conclusive, except so far as the same may be controlled by the decision of the city engineer as hereinafter provided. In case of any controversy arising over the measurement of earth under this contract or over the construction of said contract the same shall be submitted to the city engineer of the city of Seattle and his decision therein shall be final."

After the execution of the last mentioned contract, and while the assessment roll was in the hands of the city council for final adjustment, this court rendered a decision holding, in substance, that property which the jury in the condemnation proceedings found would be damaged by the proposed improvement could not afterwards be assessed to pay the cost of the improvement. *Schuchard v. Seattle*, 51 Wash. 41, 97 Pac. 1106. The effect of the rule announced was to render uncollectible some \$67,000 of the amount of the assessment then under adjustment by the city council, and the city authorities were obligated to find means by which to make up the deficiency. The city engineer found upon examination that by changing the slopes from 1 to 1 to $\frac{3}{4}$ to 1, that is, $\frac{3}{4}$ of a foot back onto the abutting property to 1 foot of vertical excavation, the decreased cost of the improvement would equal the deficiency, and conceiving that he had authority, in virtue of the provisions of the contract making the "plans and specifications subject to such changes, additions or instructions as the city engineer may require," to make such a change, ordered this change in the plans and specifications of the work. The change was thereupon reported to the city, and on March 31, 1909, was formally ratified by the finance committee of the city council, and the contractor instructed in writing to conduct the excavation according to the change so made.

On May 20, 1909, the contractor wrote the owner a letter, the body of which was as follows:

"Referring to your contract with us dated Nov. 9th, 1908, providing for the excavation of your two lots at the corner of Third avenue and Lenora street, lots 1 and 2, in block C.

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For your information will state that some of your work has been done; we cannot state at this time when your contract will be completed but when it is, regular bill will be sent you. The total yardage involved is 26,424 cu. yds."

The owners gave the letter no attention until some time after its receipt, when Oscar P. Atwood went to the office of the contractor to inquire about it. He was then informed of the cause of the increased estimate of the yardage to be charged to him, and left, saying, in effect, that he would investigate the matter before paying for the increased quantity. The work of excavating the property was completed about February 10, 1910, at which date the contractors sent the owners a bill for \$7,121, claiming the amount to be due for excavating 26,424 cubic yards of earth, the quantity being computed on the basis of a $\frac{3}{4}$ to 1 slope. The owners tendered \$5,295.80 for the excavation of 19,613 cubic yards of earth, the quantity removed from their property, estimating the street to be cut at a 1 to 1 slope. This sum was not accepted by the contractors. This action was thereupon begun by the owners to determine the amount of their liability. On the trial the court ruled in their favor, and entered judgment accordingly. This appeal was taken therefrom.

The question principally discussed by the appellants is the power of the city engineer to make the change in the slope of the cuts attempted to be made by him and according to which the appellants prosecuted the work. It is argued that the power was conferred on the engineer by that clause of the contract which empowers him to make such changes and alterations in the plans and specifications as the successful prosecution of the work may require. But we think it manifest that this clause of the contract cannot authorize such a radical change in the contract as was here attempted. No doubt under this provision the engineer could lawfully make such changes and alterations as were necessary to correct structural defects in the plans of the work or to overcome

engineering difficulties arising from conditions not foreseen or known at the time the contract was entered into, or may-haps correct minor and inconsequential omissions and mistakes therein, but the principle cannot be extended to cover a case such as the one now in question. The change attempted to be made was radical instead of minor and inconsequential. The necessity for it did not arise from any defect in the plan of the work or from engineering difficulties not foreseen at the time the contract was entered into. The change was made for the sole purpose of eliminating a large part of the cost of the work, and this was clearly not within the powers of the engineer.

But it is said that the change was ratified by the city and was a matter solely between the contractor and the city, and since they are satisfied, no one else has a right to complain. But the premise here assumed is incorrect. On the contrary, the property owner has a vital interest in the character of work and in the contract for the work; his property is to be assessed to pay the cost of the work. It will be remembered from the facts recited that the work was instituted on the petition of the property owners, who specified the character of slope to the cuts they desired to have made; that the city adopted the plans suggested; and that the condemnation proceedings, which were brought to determine the amount of damages the several property owners would suffer by reason of the improvement, were based on the assumption that a side slope of 1 to 1 would be made in all of the cuts. It is plain that any material change in the slope must materially affect this question of damages. Some of the property holders obtaining damages might not have obtained any had their damages been estimated on the basis of a $\frac{3}{4}$ to 1 slope, while it is evident that those situated as the respondent is situated, who must excavate their lots to the street level to make them accessible, would be materially damaged by the change. This the city is forbidden to do by the state constitution unless the owner be compensated therefor. The city,

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therefore, was likewise without power to make the contemplated change in the manner it was attempted to be made without the consent of the property owner.

Since neither the city engineer nor the city itself had the power to alter the contract in the manner attempted without the consent of the property owners, it must follow, we think, that the contractor cannot call upon the property owner to pay for the excavation of the quantity of earth sought to be eliminated from the city's contract by the attempted change. However valid the change may have been as between the city and the contractor it was invalid as to the owner, and his liabilities cannot in any manner be affected thereby. As the earth has been removed by the contractors they must bear the burden thereof, unless the city comes to their relief by causing a reassessment to be made upon the property benefited, or by payment from its general fund.

It is suggested that the owner's contract with the contractor obligated them to pay for the part eliminated by the city. But plainly this is not so. The latter contract was made before any alteration in the principal contract was attempted by the city engineer or the city, and at a time when all of the parties contemplated that the city would remove all of the earth on the owner's lot included within the stated slope. It was thus only the remainder that was intended by the parties to be included within the contract, and this remainder could not be increased nor diminished by acts of third persons not sanctioned by the owners.

The appellants further argue that inasmuch as the city had power to assess this deficiency against the owners of property benefited by the improvement, and could thus have compelled them to pay the cost as an additional assessment, the property owners ought not in equity and good conscience be heard to complain of the plan adopted, since it was only another mode of accomplishing the same result. But by a reassessment the deficiency would have been distributed among the property owners benefited ratably and in proportion to

the benefits the work as an entirety conferred upon their property. The method adopted, if carried out, would not assess the property ratably and in proportion to benefits. The respondents' property, by reason of the fact that the cut in its front exceeded one hundred feet in depth, would be charged with a large part of the deficiency, while neighboring lots but a short distance away, which had no cut at all in their front and which were equally benefited by the general improvement, would escape altogether. Such inequalities would not be tolerated in a general assessment, and, of course, no substitute for a general assessment can be tolerated which works such inequalities.

It is next contended that the respondents are estopped by their conduct from questioning the legality of the change made in the principal contract. This contention is founded upon the letter above quoted and the acts of the respondent Oscar P. Atwood with reference thereto. It is thought that Atwood owed the contractors the duty of notifying them that they would not recognize the validity of the attempted modification before the work was completed, but the respondents owed the contractors no such duty. It was enough that they did not mislead the contractor by their conduct into the belief that they assented to the modification. Here there was no such conduct. The letter, it will be observed, makes no direct mention of a change in the contract with the city, and called for no reply. And the record shows that the particular respondent who called to inquire concerning the increased estimate of yardage and was told of the modification, so far from assenting to modification, expressly stated that he would investigate the matter before paying for the increased yardage. This is an indication of nonassent to the modification rather than a direct assent thereto. The contractors certainly could not have been misled by the respondent's conduct, and they cannot claim relief on the ground of estoppel unless they were so actually misled.

A clause in the contract between the contractor and the

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owners provided in effect that all disputes as to the amount of excavation to be paid for should be finally determined by the city engineer. It is claimed that the city engineer had the right under this clause to determine whether or not the owner should pay for the increase of excavation caused by the change in the plans, and that he had decided, or would decide, that the respondents were liable. But it seems clear to us that this was not a matter within the power of the engineer to determine. The disputes as to the quantities, which he is empowered to decide, must arise under the contract. The excavation in dispute was, as we have shown, clearly not covered by the owners' contract, and the engineer could, with the same propriety, have determined that these particular owners should pay for excavating all of the earth eliminated from the principal contract by the change made therein as he can determine that they shall pay for the part in front of their own lots.

The foregoing considerations require an affirmance of the judgment, and it will be so ordered.

DUNBAR, C. J., PARKER, MOUNT, and GOSE, JJ., concur.

[No. 9561. *En Banc*. August 10, 1911.]

W. E. FRY, *Appellant*, v. JOEL W. THORNE, *Respondent*.¹

SALES—OPTIONS—NATURE OF TRANSACTION—CONSTRUCTION BY PARTIES—CORPORATE STOCK. The delivery of mining stock to a bank in escrow under a written agreement directing the delivery of the stock upon payment of specified sums at stated times, which payments were to draw interest "if paid," and providing that if the payments were not made the bank was to return the stock to the owner, is an option and is not enforceable as a sale by the owner seeking to recover the purchase price; especially where in contemporaneous letters he construed it as an option.

Appeal from a judgment of the superior court for King county, Yahey, J., entered March 25, 1911, in favor of the

¹Reported in 117 Pac. 230.

defendant, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

W. F. Hays, for appellant.

Herr, Bayley, Wilson & Smith, for respondent.

DUNBAR, C. J.—Plaintiff brought this action for the specific performance of an oral contract for the sale of 990,000 shares of the capital stock of the Romance Mining Company of Prescott, Arizona. The complaint alleges, in brief, that he sold to the defendant 990,000 shares of the stock of the Romance Mining Company for \$19,800, at Prescott, Arizona, on the 20th day of November, 1908; that on or about May 20, 1909, in accordance with the agreement, which was in writing, the defendant paid \$300 on account of the purchase price of said stock, and that no further payments have been made; and prays judgment for the balance claimed to be due. The defendant denied the sale, and alleged other affirmative matters which it is not necessary to set forth. It is claimed by the plaintiff, that he was overreached by the defendant, who, for the purpose of getting rid of the plaintiff, prevailed upon him to resign the management of the corporation, the Romance Mining Company, of which he was at the time director and manager; that as an inducement for selling the stock to the defendant, he agreed to resign, and did resign, as manager and director of said mining company. This contention is flatly disputed by the defendant.

This transaction, it seems from the record, was clearly a written one, and the paper filed is as follows:

“Deed in Escrow, from W. E. Fry, hereinafter called the first party, to Joel W. Thorne, hereinafter called the second party. Total consideration \$19,800 with interest as herein below stated.

“To the Bank of Arizona, Prescott, Arizona: This envelope is deposited with you in escrow, subject only to the following instructions: The within papers are to be delivered to the above designated second party, its orders or assigns, upon

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demand, if said second party, its agents or assigns, shall deposit with you for the credit and use of the above designated first party the full amount of the total consideration hereinabove written, the title and terms of payment being as follows, to wit."

The times and terms are left blank, and on the face of the paper it is stated: "As designated on the reverse side of this envelope." The paper continuing says:

"But if said payments, or any of them, are not made at the time and in the amounts hereinabove stated, you will accept no further payments and deliver inclosed papers to first party or order on demand. Time being the essence of these instructions."

There are some further immaterial instructions to the bank in relation to the stock inclosed, and the paper is then signed: "W. E. Fry and Joel W. Thorne. November 20, 1908." The outside of the envelope referred to in the body of the instrument sets forth in detail the title and amount of the payments. Then the following is added:

"All payments subsequent to the first two payments above mentioned shall, if made, draw interest at the rate of six per cent per annum from January 1, 1910, until said payments are respectively made, and all such interests shall be paid to the said escrow holder at the time the last payment above mentioned is made.

"(Signed) Joel W. Thorne. W. E. Fry."

The pertinent and only question in this case is, Does the instrument filed with the bank constitute a contract of sale or an option for the sale of the mining stock? Many authorities are cited by the appellant and quoted at large to sustain the contention that the instrument constitutes a contract of sale. But while the correctness of the law announced in those authorities cannot be gainsaid, the record in this case does not bring the case within the scope of the principles announced by such authorities.

"An option is a privilege existing in one person, for

which he has paid money, which gives him the right to *buy* certain merchandise or certain specified securities from another person, if he chooses, at any time within an agreed period, at a fixed price, or to *sell* such property to such other person at an agreed price and time." Black's Law Dictionary, page 856.

"An option is a right acquired by contract to accept or reject a present offer within a limited or reasonable time in the future." 21 Am. & Eng. Ency. Law (2d ed.), p. 924.

It seems clear to us that the instrument which was filed with the bank constitutes nothing more than an option. It was contemplated by the parties, as shown by the instrument itself, that all payments might not be made, for it is provided in one of the instructions that all payments subsequent to the first two payments above mentioned shall, *if made*, draw interest. This stock was deposited in the hands of a trustee to be delivered on condition that certain payments were made, and it is as clearly announced that, if the payments were not made according to the terms specified in the instrument, the stock was to be returned to the plaintiff, and the funds which had been paid were to be, and were actually, left to the credit of the plaintiff; that is, the ordinary condition of an option and the ordinary result where a payment is made and a deed or title to the property is to be made upon the payment as provided for in the contract. The conditions are so plain that it is difficult to construe the contract. It provides for partial payments, and what shall happen in the event of failure to make the balance of the payments at the time specified. In addition to this, the construction placed upon the contract itself by the parties to the contract may be considered. In a letter written by the appellant to the respondent on March 22, 1909, in referring to this contract, among other things, he states:

"I am satisfied, if you do not take up my option, that I can sell your interest and mine to that mill crowd. The engineer is an old New York man and a fine fellow."

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Again, in a letter addressed to the Romance Mining Company, November 20, 1908, it is said:

"I have this day given to Joel W. Thorne an option upon all of the capital stock of your company now owned by me, for the consideration of \$19,800, payable as follows: [setting forth the payments.] I have agreed with Mr. Thorne that I will resign as general manager of your company during the entire period for which the aforesaid option is in force. Therefore, in consideration of the facts as above stated, I do hereby resign as general manager of your company, the same to take effect immediately and continue in effect so long as the said option shall remain in full force and virtue and the payments thereby provided for are made. This resignation is to become absolute when the total consideration provided for in such option is fully paid. But if default is made in making any payments provided for in said option, this resignation shall thereby and thereupon become of no effect.

"Respectfully submitted,

W. E. Fry."

It would seem that the contract, when construed in connection with the expressed construction placed upon the transaction by the plaintiff, would leave little to be said in favor of his contention that this contract constituted a contract of sale instead of an option.

The judgment is affirmed.

CHADWICK, MOUNT, GOSE, ELLIS, CROW, MORRIS, and FULLERTON, JJ., concur.

[No. 9549. Department One. August 10, 1911.]

WALTER WILLIAMS, *Respondent*, v. THE CITY OF SPOKANE,
Appellant.¹

DISMISSAL AND NONSUIT—VOLUNTARY—TIME FOR—STATUTES. Under Rem. & Bal. Code, § 408, providing that a plaintiff may take a judgment of nonsuit at any time before the jury retires, it is not an abuse of discretion to grant plaintiff a nonsuit without prejudice after argument upon defendant's challenge to the sufficiency of plaintiff's evidence, and after the court had indicated its view that the evidence was insufficient and had denied plaintiff's request to reopen the case for further evidence.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 8, 1910, granting a voluntary dismissal without prejudice, on motion of the plaintiff, in an action for personal injuries. Affirmed.

Fred B. Morrill and Cannon, Ferris, Swan & Lally, for appellant, contended, among other things, that when defendant made its motion for judgment and plaintiff resisted the same and argued the case before the court, the case was finally submitted to the court on a question of law, under Rem. & Bal. Code, § 340, and thereafter plaintiff was not entitled to dismiss his case; and Rem. & Bal. Code, § 408, subdiv. 1, has no application. *Nashville, C. & St. L. R. Co. v. Sansom*, 113 Tenn. 683, 84 S. W. 615; *Parks v. Southern R.*, 143 Fed. 276; *Huntt v. McNamee*, 141 Fed. 293; *Sharp v. Brown*, 34 Neb. 406, 51 N. W. 1030; *State v. Scott*, 22 Neb. 628, 36 N. W. 121; *Johnson v. Bailey*, 59 Fed. 670; *Fronk v. Evans City Laundry*, 70 Neb. 223, 96 N. W. 1053; *Bee Co. v. Dalton*, 68 Neb. 38, 93 N. W. 930; *Warner v. Warner*, 83 Kan. 548, 112 Pac. 97; *Dunkle v. Spokane Falls & N. R. Co.*, 20 Wash. 254, 55 Pac. 51.

DUNBAR, C. J.—This action was commenced by plaintiff to recover damages for personal injuries received by him

¹Reported in 117 Pac. 251.

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while employed by the defendant. It is not necessary to enter into a review of the character or cause of the accident which occasioned the injury. At the close of the plaintiff's testimony, defendant challenged the sufficiency of the evidence to support any verdict, and moved the court for an order dismissing the case. Extended argument pro and con upon this motion was made, and the court, after reviewing the testimony at some length and giving his views on the law of the case, concluded as follows, addressing one of counsel for the plaintiff:

"Well, those are the doubts that suggest themselves to me. I do not mean that my position is impregnable, but I am merely telling you what my position is, and if counsel care to present their case further in the morning upon that line, I will hear what you have to say about it. But those are my doubts and the doubts which you must remove to have a favorable ruling."

When the court convened the following morning, there was no resumption of the argument commenced the day before, but counsel for plaintiff asked permission of the court to reopen the case and introduce additional evidence. This request was earnestly opposed by counsel for the defense, and was finally denied by the court. Whereupon counsel for the plaintiff moved the court to voluntarily dismiss without prejudice, so that the suit could be brought over again and properly presented and properly tried. Counsel for the defendant objected to this motion, saying: "I base my objection on the ground that a decision has already been announced and it is too late to dismiss." To which the court responded:

"I do not think so. I merely suggested to Mr. Crane the propositions on which I had my doubts and gave my reasons for the faith that was in me, and said to him I would be glad to hear from him this morning if he could dispel those doubts. I did not intend from what I said to decide this case, although I gave my reasons at some length for my view, which I said would require considerable argument to change. But I did not intend it as a decision in the case. It was merely a statement to counsel on the point I desired to hear

him on, and the reason why I wanted to hear him on that point."

Counsel for the defense again insisted that the court had decided the case, and the court reiterated the fact that he did not intend to decide the case and that there was no decision announced, concluding: "I think the motion to dismiss without prejudice should be granted;" to which an exception was taken. Judgment was entered accordingly, and appeal followed.

The law on which the motion for a voluntary nonsuit was based is Rem. & Bal. Code, § 408, and is as follows:

"An action may be dismissed, or a judgment of nonsuit entered, in the following cases:

"(1) By the plaintiff himself, at any time before the jury retire to consider their verdict, unless setoff be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action; . . ."

It is the appellant's contention that the motion made by the appellant required the court to decide whether or not the plaintiff was entitled to have his case submitted to a jury; that this raised an issue of law which would be decisive of the case; that the plaintiff has no right to dismiss a case when the proceedings have reached a stage which has given the defendant a right against the plaintiff, and that this case had reached that stage when the defendant had a right to a judgment in its favor on the merits, and that the court erred in allowing plaintiff to dismiss; that when defendant made its motion for judgment and plaintiff resisted the same and argued the motion before the court, the case was finally submitted to the court on a question of law, and that, after it was so argued and submitted, plaintiff was not entitled to dismiss his case, especially after the court had stated his views of the law which must control the ruling on this motion; and an extended argument is made in support of this contention, and many cases are cited to sustain appellant's views. But a reading of the cases cited convinces us that

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they do not reach the point involved in the case at bar. The first case cited, *Nashville etc. R. v. Sansom*, 113 Tenn. 683, 84 S. W. 615, cited in the brief as 85 S. W., held that where issue was joined on the demurrer to the plaintiff's evidence it was too late after argument of the demurrer for plaintiff to take a nonsuit; that by joining issue on a demurrer to plaintiff's evidence the case was withdrawn from the jury and was submitted to the court. But on an examination of the statute of Tennessee, the case being decided by the supreme court of Tennessee, it will be seen that there is a substantial dissimilarity between that statute and ours. Section 4689 of Shannon's Code, then under consideration by the court, provides that:

"The plaintiff may, at any time before the jury retires, take a nonsuit or dismiss his action as to any one or more defendants, but if the defendant has pleaded a set-off or counterclaim, he may elect to proceed on such counterclaim in the capacity of a plaintiff."

Section 4690:

"The defendant may, in like manner, withdraw his counterclaim at any time before the jury retires to consider of their verdict."

Section 4691:

"If the trial is by the court instead of the jury the nonsuit or demurrer provided for in the last two sections shall be made before the cause is finally submitted to the court, and not afterwards."

The court in passing upon the question said:

"Such was the status in the present case when the motion for leave to take a nonsuit was made. The case had been withdrawn from the jury and submitted to the court. It was then controlled by section 4691. There was a final submission to the court when the argument upon the demurrer to the evidence was at an end. The section of the code last referred to provides that, when the case has reached this stage, no nonsuit shall be allowed."

So that it will be seen that this case was decided squarely upon a provision of the statute which is not found in our law at all. By reference to our statute it will be seen that the sweeping provision that the plaintiff shall have a right to a judgment of nonsuit any time before the jury retire to consider their verdict has no qualification except those expressed in the section, viz., unless set-off be interposed as a defense or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action, and it is difficult to construe a statute which so plainly confers an unrestricted right.

In *Parks v. Southern R. Co.*, 143 Fed. 276, the rule was announced as a general rule pertaining to the Federal courts that, in a state where a plaintiff is entitled to take a nonsuit as a matter of right, such right must be exercised in a Federal court before the cause has been submitted for decision either to the court or jury; the court saying:

“At common law the action of the court upon a motion for a nonsuit was not a discretionary one, but the plaintiff, as of right, could at any time before verdict exercise this privilege; and this is now substantially the rule in North Carolina. But the more reasonable practice, certainly so far as the Federal court are concerned, is that the plaintiff has the right to take a nonsuit at any time before a case has been submitted to the judge or jury for determination. The plaintiff upon the making of a motion to instruct a verdict against him, that being one of the methods in the Federal court of finally disposing of the cause, should then elect whether or not he will take a nonsuit, and not submit his cause upon a full hearing of that motion to the court, and take chances of an adverse decision thereon. From the time of the submission of the motion to instruct a verdict the granting of a nonsuit lies wholly in the discretion of the court; and if the court should be of the opinion that the plaintiff for any reason has been deprived of a right to submit all the evidence on which he relied, or anything should occur during the trial in the nature of a surprise to the plaintiff, there should be a liberal exercise of this discretion in his favor;”

thus announcing the doctrine that the right to have the mo-

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tion granted was a discretionary right rather than a positive right. The court in that case had refused to grant the nonsuit, and the judgment was sustained on the theory that the granting of the nonsuit was wholly within the discretion of the court.

It might be true, as was said by Mr. Justice Field in the case of *Oscanyan v. Arms Co.*, 103 U. S. 261, that if the court was perfectly satisfied that the plaintiff had failed to make out a case after a full presentation of all his available testimony, it would be idle to grant a motion for a voluntary nonsuit, for the result finally could be nothing more than would be attained by sustaining a demurrer to the sufficiency of the testimony. To the same effect is *Johnson v. Bailey*, 59 Fed. 670, where it was decided that, after the trial was actually begun, the plaintiff has no absolute right to take a nonsuit, and the same lies in the liberal discretion of the court. In *Huntt v. McNamee*, 141 Fed. 293, it was again decided that, where a voluntary nonsuit was permitted by the state practice, it was within the discretion of a Federal court to refuse to allow a nonsuit after plaintiff had concluded his evidence, and a motion by defendant for direction of a verdict had been submitted and sustained, on the grounds both of the insufficiency of the complaint and of the evidence to sustain it. In this case also the trial court had refused to sustain the motion for a voluntary nonsuit, and judgment was affirmed on the theory advanced in the other cases, that it was a matter of discretion with the court. The same condition existed in *Sharp v. Brown*, 34 Neb. 406, 51 N. W. 1030. The other cases cited by appellant, without specially reviewing them, all announce the same doctrine, viz., the doctrine of the discretion of the court.

In the case at bar it will be remembered that the cause which prompted the motion for a nonsuit was the refusal of the court to allow the plaintiff to introduce additional testimony. The statute conferring the right of the plaintiff to take a voluntary nonsuit was made for the benefit of litigants

who, through mistake or inadvertence, fail to get before the court or the jury all the available testimony in the case, and to prevent a miscarriage of justice. It must be in the interest of justice that the court is permitted great discretion in matters of this kind, and there can be no virtue in the contention that this motion should not have been allowed by the court because a prior motion had been made for judgment on the testimony. The result of a lawsuit ought not to abide the result of a race between opposing counsel in making motions; and if the plaintiff was entitled to the motion for a nonsuit under all the circumstances of the case, he was as much entitled to it after the motion made by the defense as he was before. Justice demands that large discretion should be vested in the court in the trial of a lawsuit. The court has an undoubted right to hold one motion in abeyance until it decides another. It has a right to reopen a case and admit additional evidence, when it can determine from the whole proceedings in the case that a failure to do so would work an injustice. It has a right to recall witnesses for further examination; to allow witnesses to correct their testimony; to admit irrelevant testimony on a promise to subsequently show relevancy, etc. It is said by Thompson on Trials, page 310, in giving a review of the large discretionary powers of a court, that the court may allow a party to introduce further evidence, after the testimony is closed on both sides, after a demurrer to the evidence has been made, after the argument has commenced, and even after the argument has closed. We have examined the record in this case, and think that the court plainly had discretionary power to grant the motion for a nonsuit, and that such discretion was not abused.

The judgment will therefore be affirmed.

MOUNT, GOSE, and FULLERTON, JJ., concur.

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Statement of Case.

[No. 9258. Department Two. August 10, 1911.]

NELLIE OVERACKER, *Respondent*, v. NORTHERN PACIFIC
RAILWAY COMPANY, *Appellant*.¹

EVIDENCE—EXPERTS—HYPOTHETICAL QUESTIONS—BASIS—INFERENCES. An inference from established facts that a spark had been thrown from a locomotive engine, and set fire to a house 85 to 100 feet from the track, may properly be made the basis of a question to an expert as to whether the spark arrester was in good condition.

RAILROADS—FIRES—EVIDENCE—CAUSE OF FIRE—QUESTION FOR JURY. Evidence that an engine threw sparks some distance large enough to ignite fires, and that a house without any fire in it was within the danger zone and was burned shortly after the passing of the engine, is sufficient to raise a question for the jury as to whether the fire was ignited by a spark from the engine.

RAILROADS—FIRES—CONDITION OF ENGINE—EVIDENCE—SUFFICIENCY. The jury are warranted in finding that an engine is not shown to be in good condition for arresting sparks unless there was an examination of a certain plate, which was the most important feature in the spark arresting device and unsafe if it had holes in it, where the plate could not be examined without taking off the netting, and mechanics had been instructed not to take off the netting except to clean out the nozzle, and this had not been done for some time.

RAILROADS—FIRES—ACTIONS—PLEADING AND PROOF—TITLE TO PROPERTY—PARTIES—CAPACITY TO SUE—AMENDMENT OF COMPLAINT. In an action against a railroad company for setting fire to a house, alleged to belong to the plaintiff, it cannot be objected that the evidence showed that another owned a life estate therein, where the plaintiff offered to file a stipulation releasing all liability to the life tenant, which was done prior to a verdict by the life tenant, who entered an appearance in the action; and it was not necessary to make the life tenant a party by formal amendment of the complaint, as it will be treated as amended to conform to the proofs.

Appeal from a judgment of the superior court for King county, Albertson, J., entered May 17, 1910, upon the verdict of a jury, rendered in favor of the plaintiff, in an action for damages to property by fire. Affirmed.

¹Reported in 117 Pac. 403.

C. H. Winders, for appellant, contended, among other things, that negligence in this class of cases, must be both alleged and proven, and that the plaintiff must sustain the burden of proving the facts alleged. *Elliott, Railroads* (2d ed.), §§ 1221, 1241; 2 *Thompson, Negligence*, §§ 2230, 2249; *St. Louis & S. F. R. Co. v. Mathews*, 165 U. S. 1; *Flinn v. New York etc. R. Co.*, 142 N. Y. 11, 36 N. E. 1046; *Henderson, Hull & Co. v. Philadelphia etc. R. Co.*, 144 Pa. St. 461, 22 Atl. 851, 27 Am. St. 652, 16 L. R. A. 300; *Lowney v. New Brunswick R. Co.*, 78 Me. 479, 7 Atl. 381; *Bernard v. Richmond etc. R. Co.*, 85 Va. 792, 8 S. E. 785, 17 Am. St. 103; *Pittsburg etc. R. Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285. Where a fact which must be determined by a jury can be only determined by speculation and conjecture, it is the duty of the trial court to take the case from the jury. *Knapp v. Northern Pac. R. Co.*, 56 Wash. 662, 106 Pac. 190; *Byrne v. Spokane & Inland R. Co.*, 56 Wash. 667, 106 Pac. 191; *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121; *Wilkie v. Chehalis County Logging & Timber Co.*, 55 Wash. 324, 104 Pac. 616; *Whitehouse v. Bryant Lumber & Shingle Mill Co.*, 50 Wash. 563, 97 Pac. 751. Proof of the starting of a fire shortly after the passing of an engine is not alone sufficient. *Lake Erie & W. R. Co. v. Gossard*, 14 Ind. App. 244, 42 N. E. 818; *Clark v. Grand Trunk Western R. Co.*, 149 Mich. 400, 112 N. W. 1121; *Peffer v. Missouri Pac. R. Co.*, 98 Mo. App. 291, 71 S. W. 1073; *Farley v. Mobile & O. R. Co.*, 149 Ala. 557, 42 South. 747; *St. Louis Southwestern R. Co. v. McIntosh etc.* (Tex. Civ. App.), 126 S. W. 692; *American Ice Co. v. Pennsylvania R. Co.*, 224 Pa. 439, 73 Atl. 873; *Cyle v. Denver & R. G. R. Co.*, 37 Colo. 298, 86 Pac. 1010; *Minneapolis Sash & Door Co. v. Great Northern R. Co.*, 83 Minn. 370, 86 N. W. 451; *White v. New York Cent. & H. R. R. Co.*, 90 App. Div. 356, 85 N. Y. Supp. 497; *Id.*, 181 N. Y. 577, 74 N. E. 1126; *Cincinnati etc. R. Co. v. Sadierville Milling Co.*, 137 Ky. 568, 126 S. W. 118; *Miller-Brent Lumber Co. v. Doug-*

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Citations of Counsel.

las, 167 Ala. 286, 52 South. 414; *Smith v. Northern Pac. R. Co.*, 3 N. D. 17, 53 N. W. 173; *Denver, T & G. R. Co. v. De Graff*, 2 Colo. App. 42, 29 Pac. 664; *Bates County Bank v. Missouri Pac. R. Co.*, 98 Mo. App. 330, 73 S. W. 286; *Shipman v. Chicago etc. R. Co.*, 78 Neb. 43, 110 N. W. 535; *Manning v. Cape Girardeau & C. R. Co.*, 137 Mo. App. 631, 119 S. W. 464; *Finkelston v. Chicago, M. & St. P. R. Co.*, 94 Wis. 270, 68 N. W. 1005. The fact that fires were started at various times along the right of way is no evidence of negligent equipment. Elliott, Railroads, § 1221; Thompson, Negligence, §§ 2230, 2249; *Svea Ins. Co. v. Vicksburg, S. & P. R.*, 153 Fed. 774; *Garrett v. Southern R.*, 101 Fed. 102, 49 L. R. A. 645; *Bernard v. Richmond, F. & P. R. Co.*, 85 Va. 792, 8 S. E. 785, 17 Am. St. 103; *Atlantic Coast Line R. Co. v. Watkins*, 104 Va. 154, 51 S. E. 172; *Pittsburg, C. & St. L. R. Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285; *Henderson, Hull & Co. v. Philadelphia etc. R. Co.*, *supra*. Even if the defendant were required to take the burden upon itself, the defendant in this case, by showing that it had used every modern appliance and used every reasonable care to keep such appliances in repair, overcame the circumstantial evidence and every negative suggestion made by the plaintiff's evidence, entitling it to the judgment asked. *Long v. McCabe & Hamilton*, 52 Wash. 422, 100 Pac. 1016; *Weckter v. Great Northern R. Co.*, 54 Wash. 203, 102 Pac. 1053; *Toledo etc. Co. v. Star Flouring Mills Co.*, 146 Fed. 953; *Menominee River Sash & Door Co. v. Milwaukee & N. R. Co.*, 91 Wis. 447, 65 N. W. 176; *Ragsdale v. Southern R. Co.*, 121 Fed. 924; *Farley v. Mobile & O. R. Co.*, 149 Ala. 557, 42 South. 747; *Woodward v. Chicago, Milwaukee & St. P. R. Co.*, 145 Fed. 577; *Louisville & N. R. Co., v. Marbury Lumber Co.*, 125 Ala. 237, 28 South. 438, 50 L. R. A. 620; *Rosen v. Chicago, Great Western R. Co.*, 83 Fed. 300.

Edwin H. Flick (C. E. Hughes, of counsel), for respondent, contended, *inter alia*, that in most of the cases cited by appellant, the defendant had established that the spark ar-

resting equipment was in proper condition. See *Flinn v. New York etc. R. Co.*, *Henderson, Hull & Co. v. Philadelphia etc. R. Co.*, *Bernard v. Richmond etc. R. Co.*, *Lake Erie & W. R. Co. v. Gossard*, *Clark v. Grand Trunk Western R. Co.*, *Minneapolis Sash & Door Co. v. Great Northern R. Co.*, *Cincinnati etc. R. Co. v. Sadieville Milling Co.*, *Toledo etc. Co. v. Star Flouring Mills Co.*, *Ragsdale v. Southern R. Co.*, *Woodward v. Chicago, Milwaukee & St. P. R. Co.*, *Louisville & N. Co. v. Marbury Lumber Co.*, and *Rosen v. Chicago Great Western R. Co.*, *supra*. The evidence was competent and sufficient. *Koontz v. Oregon R. & Nav. Co.*, 20 Ore. 3, 23 Pac. 820; *Hawley v. Sumpter R. Co.*, 49 Ore. 509, 90 Pac. 1106, 12 L. R. A. (N. S.) 526; *Kentucky Cent. R. Co. v. Barrow* (Ky.), 20 S. W. 165; *Cleveland v. Grand Trunk R. Co.*, 42 Vt. 449.

MORRIS, J.—This action was brought to recover for the destruction by fire of a dwelling house and other property, through the alleged negligence of appellant in operating an engine upon its right of way adjacent to the property destroyed, not properly equipped with spark arrester, and because thereof, emitting sparks of sufficient size and quantity to set fire to respondent's house. Another charge of negligence was in permitting grass and other inflammable material to accumulate along the right of way adjacent to the property destroyed, in which a fire was started by a spark from an engine and the fire communicated to respondent's property. Issue being joined, trial was had, resulting in verdict and judgment for respondent, from which the railway company appeals.

The errors assigned are various rulings of the trial court, upon motions of appellant questioning the sufficiency of the evidence, rulings upon the admissibility of testimony, and a portion of the instruction to the jury. Special interrogatories were submitted to the jury with the verdict, by which they found that the fire was not communicated to the house

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from a fire originating in the grass along the right of way, but was started from sparks thrown directly from a passing locomotive to the roof of the house, and that the spark arrester of this locomotive was not in a good condition.

The evidence shows that the burned dwelling was between 85 and 100 feet east of the railway track, which runs north and south; that on the day in question, July 31, 1909, about six o'clock in the evening, the wind was blowing in a general southeasterly direction, which would be diagonally from the track toward the house; that the house had not been inhabited for about two weeks prior to the fire, being locked up during that time, and was found locked at the time of the fire; that during the absence of the owners, the property was in charge of Mrs. Lord, a neighbor, who lived about 150 feet south of respondent's home; the next nearest house was about two blocks from Mrs. Lord's house; that about 5:30 in the evening Mrs. Lord went to respondent's house to gather the eggs and shut up the chickens, putting out the fire in her range before doing so; that she remained a few minutes, and then went back to her own home; that at that time there was no fire in the house or about the premises; that she then started for Houghton, a little hamlet a few blocks away on the west side of the track, along the shore of Lake Washington; that when she reached her front gate, a freight train was passing, and she stopped and waited for it to pass; that the engine was then throwing sparks about 15 feet away; that she walked down the track and saw a fire in the dry ferns and grass along the right of way, from one to two hundred feet north of her house; that when she returned, in about half an hour, respondent's house had burned, and this grass fire had worked its way south to the corner of her front porch, when it was put out. Another witness, Kirkley, testifies to seeing the fire running through the grass on the hill beyond the right of way, a short distance north of respondent's house, and that when he first noticed the fire in respondent's house, it was breaking through the roof under the eaves, about 6:15.

It was also shown that other fires had started on respondent's premises some time before this, and that, about a week before this fire, sparks were thrown from passing engines, some small and some large, that would carry about 70 feet. Other witnesses testify to seeing sparks carry the length of the court room, which is said to be 55 feet. A witness, Hilyer, was asked:

"Where a spark, we will say, had traveled from an engine from 85 to 100 feet and had been of sufficient size and heat when it fell to ignite a house, would you say that the spark arrester in that particular engine was of proper arrangement, modern and in good condition?"

to which answer was made that, if sparks were thrown 50 feet, of sufficient size to ignite a building, there must be holes through the battle plates, or through the netting.

An overruled objection to this question is charged as error. We do not so regard it. It is true, no witness had testified to seeing a spark thrown this distance and ignite this dwelling, but there was evidence which would justify an inference that the fire originated from a spark thrown that distance. A proper inference drawn from established facts is as good a basis to found a hypothetical question upon as the facts themselves. Here we have the testimony of the engine throwing sparks large enough to ignite fire along the right of way and upon the hill beyond the right of way. We have a house within the danger zone to which fire has been communicated at the same time, all other sources having been eliminated. This justifies the inference that the fires had the same origin. To have had the same origin the spark must have been thrown from the engine to the house. The question then naturally follows: Is the spark arrester, permitting sparks to be so thrown, in good condition. The inference was, therefore, based upon a proper conclusion drawn from established facts, and as such, its incorporation in the question was not error. Without further setting forth the testimony, it appears to us that the reference we have made would be suffi-

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cient to submit the question to the jury. This disposes of the errors predicated upon the rulings challenging the sufficiency of the testimony.

We should have referred to one other fact present in the case at the time the motions for directed verdict, judgment, and new trial were made. Appellant had put in testimony in regard to the inspection of the spark arresting device of this engine. It is difficult to convey a clear understanding of this device without the aid of diagrams and exhibits, such as were referred to by the various witnesses. The device consists of three deflector plates and a netting, arranged so that the sparks coming from the flues first strike what we will call plate one; from thence they are deflected or thrown against plates two and three, falling downward from plate three; from thence they arise through a wire netting, and thence into the smokestack. Plate one and the netting are opposite each other, so that if there should be a hole in plate one the spark, instead of being deflected to the other plates and thence into the stack through the netting, would pass directly through such a hole into the stack, and in such case it is said property would not be safe 200 feet away from the track. In this netting there is a door used for the purpose of going in to clean out the nozzle, which is done very infrequently, sometimes once in six months, sometimes once a year, or longer. The mechanics in the round house were given instructions not to take off this netting door, which is fastened on with bolts, unless it is proposed to clean out the nozzle or make some changes in there. This had not been done in this engine for some time unknown. It also appears that an inspector examining the engine could not determine whether there were any holes in plate one unless this netting door was opened. From this evidence the jury would be justified in concluding that the engine could not be shown to be in good condition, without an examination of plate one, the most important part of the spark arresting device.

The instruction complained of is said to be erroneous because the court therein submits to the jury the question of an imperfect spark arrester and the doctrine of elimination of other causes of fire. This instruction finds support in *Abrams v. Seattle & M. R. Co.*, 27 Wash. 507, 68 Pac. 78, and is therefore sustained. The *Abrams* case is also controlling upon other disputed points in the case, based upon appellant's plea to the insufficiency of the evidence. In *Minneapolis Sash & Door Co. v. Great Northern R. Co.*, 83 Minn. 370, 86 N. W. 451, cited by appellant, to the effect that, in cases of this character, it is necessary to go further than to show a mere possibility or conjecture that a passing engine was the source of the fire, it is also said that, "where a train passing through the open country is followed in close proximity of time thereafter by a fire which starts up near its right of way, by a reasonable process of induction based upon the physical facts all other causes of the fire might be excluded and an inference might be justified that the fire was dropped from the smokestack." The case here is much stronger than the illustration given in the Minnesota case, for we are not left to an inference alone, but have direct testimony that the engine was emitting sparks sufficient in size and character to communicate fire to inflammable material upon which they fell, not only upon the right of way, but on the hill 50 feet beyond the right of way, the witness so testifying assuming the right of way to be 100 feet.

There is one more suggestion of error. The complaint described respondent as the owner in fee of the burned dwelling, while the evidence showed her title to be subject to a life estate in her mother, Anna Tuttle. When this point was made, respondent produced and made of record the following instrument, signed by the mother and entitled in the cause:

"The undersigned hereby authorizes E. H. Flick [attorney for respondent] to represent her in the case above entitled, and to enter into any stipulation he may see fit in the cause above entitled and to release any and all claims owing or due

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me under my life estate in the property at issue in this cause as against the Northern Pacific Railway Company by reason of a fire occurring on July 31st, 1909."

Mr. Flick then stated to the court:

"If Mr. Winders [counsel for appellant] is agreeable, if the jury should find a verdict for the plaintiff, I will stipulate with him and let the record show that all claim of Mrs. Tuttle will be released under the power that I have here;"

to which the court and Mr. Winders seem to have assented.

Subsequent to the verdict, Mr. Flick filed in the cause an assignment of all claim due Mrs. Tuttle under her life estate, by reason of the fire, to respondent, releasing appellant from any liability to Mrs. Tuttle, and entered the appearance of Mrs. Tuttle in the pending action. We think this disposes of appellant's contention that the respondent had no capacity to maintain this action, and that the authority conferred upon Mr. Flick was insufficient without an amendment to the complaint making Mrs. Tuttle a party.

It is apparent from these records that all persons interested in the cause of action are now in court, and that all rights growing out of this cause of action are finally determined herein. *Fireman's Fund Ins. Co. v. Oregon R. & Nav. Co.*, 58 Wash. 332, 108 Pac. 770; *German Fire Ins. Co. v. Bullene*, 51 Kan. 764, 33 Pac. 467; *Davis v. Seattle*, 37 Wash. 223, 79 Pac. 784. True, it does not appear that the complaint has been formally amended, but under the rule in this state that a complaint will be treated as amended to correspond to the proofs, and that an amendment may be had after a cause has been appealed to this court and remanded (*Jones v. Western Mfg. Co.*, 32 Wash. 375, 73 Pac. 359), the complaint will be here treated as so amended, and it is here ordered that a formal amendment be made upon the going down of the remittitur.

The judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and CHADWICK, JJ., concur.

[No. 9412. Department Two. August 10, 1911.]

O. B. THORGRIMSON, *Receiver etc., et al., Appellants*, v.
NORTHERN PACIFIC RAILWAY COMPANY, *Respondent*.¹

RAILROADS—FIRES—BURDEN OF PROOF—PRESUMPTIONS—EVIDENCE—SUFFICIENCY. While the burden of proof is probably upon a railroad company to explain the cause of fire following the passage of an engine, negligence cannot be presumed from the mere passage of an engine followed by a fire; the fact of ignition being *prima facie* evidence only when it is shown that the fire proceeded from the engine; and a verdict for the defendant is warranted, where the fire was not discovered until an hour after the engine had passed, a witness testified that the engine was not throwing sparks an unusual distance or more than usual, there was no evidence of negligent operation or defective equipment, and the jury found for the defendant upon the remaining issue as to negligent accumulations of debris on the right of way.

Appeal from a judgment of the superior court for King county, Main, J., entered November 4, 1910, upon the verdict of a jury rendered in favor of the defendant, in an action for damages to property by fire. Affirmed.

Elias A. Wright and *E. M. Farmer*, for appellants, contended, among other things, that it is sufficient to establish a *prima facie* case for the plaintiff to show that the fire was communicated from an engine of the railroad company to his property, resulting in the destruction thereof. *Anderson v. Oregon R. Co.*, 45 Ore. 211, 77 Pac. 119; *Shipman v. Chicago etc. R. Co.*, 78 Neb. 43, 110 N. W. 535; *West Side Mut. Fire Ins. Co. v. Chicago & N. W. R. Co.* (Iowa), 95 N. W. 193; *Spaulding v. Chicago & N. W. R. Co.*, 30 Wis. 110, 11 Am. Rep. 550; *Green Ridge R. Co. v. Brinkman*, 64 Md. 52, 20 Atl. 1024, 54 Am. Rep. 755; *Gulf etc. R. Co. v. Benson*, 69 Tex. 407, 5 Am. St. 74; *Louisville & N. R. Co. v. Reese*, 85 Ala. 497, 5 South. 283, 7 Am. St. 66; *Bass v. Chicago, B. & Q. R. Co.*, 28 Ill. 9, 81 Am. Dec. 254. The circumstantial

¹Reported in 117 Pac. 406.

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evidence was strong enough to make a question for the jury. *Henry v. Southern Pac. R. Co.*, 50 Cal. 176; *Butcher v. Vaca Valley etc. R. Co.*, 67 Cal. 518, 8 Pac. 174; *Missouri Pac. R. Co. v. Platzer*, 73 Texas 117, 11 S. W. 160, 15 Am. St. 771, 3 L. R. A. 639.

C. H. Winders, for respondent.¹

CHADWICK, J.—This action was brought to recover damages on account of the destruction by fire of the plant of the Olympic Roofing Company. The property destroyed was about eighty feet south of the main line of the Northern Pacific main track, on what is known as its Seattle division. The plant consisted of two buildings, connected by a plank platform about twenty-four feet wide. The buildings were covered with corrugated iron. The train which is alleged to have set the fire was going up grade past the Olympic company's plant, at about eleven o'clock at night. The train was observed by only one witness, who testified that it was working hard, "about like other trains would work," on that or other similar grades. He passed the property after the train had passed him and observed no fire of any kind, although he thinks he would have done so had it then broken out. The company employed a night watchman, who was reading a magazine when the train passed. He testifies, that there was nothing that particularly attracted his attention; that the train worked as other trains worked in going over that divide; that it was customary, and it was done in this instance, to cut the train at some place above appellant's plant, and to take the train over the heavier part of the grade in sections; that this was done on the night in question; that after the train had passed, he cooked his midnight supper; that about three-quarters of an hour after the last section had gone up, and hence an hour or more after the engine had passed the plant, he noticed a light through the window of

¹NOTE: For citations of counsel, see *Overacker v. Northern Pac. R. Co.*, ante p. 491.—REP.

his cabin; that he ran out and found the platform between the two buildings ablaze. He endeavored to get in one of the buildings, but was unable to do so, and the fire passed beyond his control. From a verdict in favor of the defendant, plaintiff has appealed.

The negligence alleged in the complaint is that respondent was negligent in the maintenance of its right of way, in that debris had been allowed to accumulate thereon, and that the engine was defective and not equipped with proper spark arresters, and was negligently operated by respondent's servants. Appellants failed to make any sufficient showing of defective equipment or negligent operation to go to the jury, and these features of the case were taken from the jury by the trial judge. The jury found with respondent upon the remaining issue; that is, the alleged negligence in caring for the right of way, so that question need not be discussed.

Although the record is long and the briefs cover a wide range, we think the question for our decision is a simple one. The rule putting the burden on the railway company to explain the cause of a fire following a passing engine, to which this court is probably committed (*Overacker v. Northern Pac. R. Co.*, ante p. 491, 117 Pac. 403), and which counsel relied on to carry the case to the jury on the questions of equipment and operation, is one of necessity, and is applied so that justice may not be defeated. But we know of no cases going to the extent to which counsel would have us go to sustain their contention; that is, to presume negligence from the mere passing of the train followed by a fire. It is the proof of setting the fire, and not the fact that a building adjacent to a railroad right of way was burned, that raises the inference of negligence and shifts the burden of proof. In all the cases we have examined, including those from our own court, where the burden has been shifted from plaintiff to defendant, there has been some evidence from which the jury might infer with reasonable certainty that the fire would not have occurred unless set by the passing train.

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Counsel admitted on the trial, and appellants now admit, that they have no evidence other than circumstantial evidence. Negligence of the character alleged may be proved by circumstantial evidence (13 Am. & Eng. Ency. Law, 2d ed., 510), but the difficulty in this case is, that the mere fact that the building burned an hour or more after a train had passed is not a circumstance showing the negligence of respondent, but is the ultimate fact, proof of which is essential, and which, being proven, raises the question—not presumption—whether the respondent's engine was properly equipped and properly operated, a fact which the books say can be explained only by the respondent company. So long as the origin of the fire is open to doubt or speculation, there is nothing for the rule contended for by appellants to operate on. Reduced to its last terms, the rule as we extract it from the cases and as stated by Thompson in his work on Negligence, § 2292, is that "the mere fact of ignition, when it is shown to have proceeded from the locomotive, is *prima facie* evidence under the principle of *res ipsa loquitur*." The fault in appellant's case is that it is not shown by any direct evidence that the fire proceeded from the locomotive, or that it was discovered so soon after the passing of the train as to reasonably exclude any other cause, or that the appliances were defective, or that there was negligent operation. Some one or all of these things must be shown in order to shift the burden of explanation. In *Finkelston v. Chicago, M. & St. P. R. Co.*, 94 Wis. 270, 68 N. W. 1005, the fire was discovered an hour and a half after sparks had been seen coming from an engine standing on a side track, six or seven feet from the warehouse which had been destroyed. The testimony showed that the engine was throwing sparks in unusual quantities and of unusual size. Discussing the element of time as it occurred in that case, the court said:

"Obviously, it is no objection that the origin of the fire was not established by direct evidence; but there must be some limit beyond which the main fact cannot be found from infer-

ence, else parties circumstanced like the defendant was may be held liable for all fires, occurring in the vicinity of their tracks, that can, by any possibility, be attributed to their conduct, unless they are able to prove that the fires were not so caused. Such a rule would subject railroad companies to such penalties as to seriously and unjustly cripple a business essential to the public welfare. The origin of a fire under such circumstances must be established so as to produce conviction, to a reasonable certainty, on an unprejudiced mind, the same as any other fact; and, until there is evidence to so establish it, the defendant is not called upon to prove that the fire was not caused as alleged. *Flanaghan v. C. M. & St. P. R. Co.* (Minn.), 67 N. W. Rep. 794; *Stratton v. U. P. R. Co.* (Colo. App.) 42 Pac. Rep. 602; *Denver, T. & G. R. Co. v. De Graff*, 2 Colo. App. 42; *Denver & R. G. R. Co. v. Morton*, 3 Colo. App. 155; *Sheldon v. H. R. R. Co.*, 29 Barb. 226."

And, after discussing the facts and the authorities, the court said:

"After a thorough search for and examination of precedents, we may safely venture the assertion that no satisfactory authority can be found for carrying the inference of the existence of facts unseen from those seen so far as would be required to send this case to a jury."

In the case of *Sheldon v. Hudson River R. Co.*, 29 Barb. 226, the court held that it would be unreasonable to charge a defendant with the destruction of plaintiff's property because a locomotive, charged to be at fault, had carried fire in the furnace, and passed within six or seven feet of the property an hour and seventeen minutes before the smoke or flames made their appearance. The element of time was considered in *Denver etc. R. Co. v. De Graff*, 2 Colo. App. 42. The court there said:

"The fact of the origin of the fire, like any other material fact, should be established; and while the jury, within certain limits, may be left to infer the fact from the circumstances proved, such proof should be sufficient to rebut the probability of the fire having originated in any other manner."

After discussing the cases denying that the mere fact that a fire breaks out upon or near a right of way after a train

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has passed will furnish evidence from which the jury may infer negligence, Mr. Thompson says: "These decisions are believed to be untenable;" but adds:

"While at the same time it must be conceded that the distance in point of time between the discovery of the fire and the passing of the train, and the surrounding circumstances making the conclusion of the fire having been set by some one else more or less probable, may be such as to make the evidence too remote." 2 Thompson, Negligence (2d ed.), § 2292.

We have not overlooked the contention of the appellants that there was evidence tending to show that the engine of the passing train threw sparks, and that the witness, testifying to that fact, said that they seemed to him to be "about as large as the end of my little finger." But the same witness says that the engine was not throwing more sparks than usual. That it is impossible to operate locomotives with coal or wood without throwing some sparks is not denied. It is a fact of which courts take judicial notice. The testimony when taken as a whole shows that they were not thrown an unusual distance, and that they did not set fire to the dried grass on the right of way is established by the verdict of the jury.

A point is made on the following questions and answers:

"Q. About what was the quantity of sparks, if you can judge, Mr. Henry, that was being thrown out? A. I could not say as to the quantity. Q. Could you estimate the size of them? A. Well, judging from the distance they were probably as large as the end of my little finger. Q. About how far from the main line, from the right of way, were they falling? A. Well, all the way from ten to twenty-five feet."

But the whole testimony of the witness relied upon to show that the engine was throwing sparks beyond the right of way shows that he was describing the distance from the engine, rather than from the outer limit of the right of way. It was evidently so understood by counsel on the trial, for the testimony quoted was followed by the following interrogatory: "Were any of them being thrown farther than twenty-

five feet?" This being objected to as leading, the subject was not pursued further.

We have not thought it necessary to discuss in detail the many authorities cited by counsel. There are two lines of authority, the one shifting the burden to defendant upon a *prima facie* showing; the other requiring an affirmative showing of negligence on the part of the plaintiff, and both of them are well sustained by authority. Those interested may find a complete discussion of the subject in chapter 75, 2 Thompson on Negligence; 33 Cyc. 1359 *et seq.*, and 13 Am. & Eng. Ency. Law (2d ed.), p. 498 *et seq.*

Exceptions were taken to the instructions given and refused, and other errors are assigned; but having held with the lower court and jury on the main issues, they have become immaterial.

Judgment affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9419. Department Two. August 10, 1911.]

SECURITY STATE BANK, *Respondent*, v. O'CONNELL LUMBER COMPANY, *Appellant*.¹

CARRIERS—BILL OF LADING—DELIVERY — CONDITIONAL DELIVERY — LIABILITY. Where defendant ordered a car load of lumber from C. to be shipped east, and C., being unable to fill the order, ordered the lumber from P., who loaded a car and took out and retained possession of a bill of lading in his own name, naming the eastern customer as consignee, and sent an invoice or bill of the lumber to C., the title of the lumber did not pass to C., who was never in possession of the bill of lading; and where P. delivered the bill of lading to plaintiff, a bank, upon plaintiff's agreement to forward the car and collect and guarantee the bill, and plaintiff sent the bill of lading to defendant, together with P's invoice to C., assigned by C. to plaintiff, explaining the circumstances and stating that P. left the bill of lading with plaintiff for collection and that

¹Reported in 117 Pac. 271.

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C's instructions were to forward to defendant and pay P. out of defendant's remittance, the defendant, upon retaining the bill and collecting the proceeds on delivery of the lumber, is liable to the plaintiff, who had paid P's bill, in an action on the bill of lading, although defendant notified the plaintiff to look to C.; and defendant's payment to C. is no defense to the action, since C's invoice was not a sale or evidence of a sale, and the title to the lumber remained in P. until he surrendered the bill of lading, and the defendant had notice of P's intention to make delivery of the lumber conditional on payment of its price.

Appeal from a judgment of the superior court for Lewis county, Rice, J., entered September 6, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on a bill of lading. Affirmed.

Carey & Kerr and *Omar C. Spencer*, for appellant.

Reynolds & Stewart, for respondent.

CHADWICK, J.—In September, 1909, the defendant, which is engaged in the lumber business at Winlock in this state, contracted with George H. Chamberlain at Chehalis for a carload of lumber, to be shipped to the American Car & Foundry Company at Madison, Illinois. It seems that Chamberlain was unable to fill the order, and he in turn ordered the lumber from one Hamilton Pitcher of Napavine, who loaded a car of lumber and took out a bill of lading in his own name, with the American Car & Foundry Company, Madison, Illinois, named as consignee therein. At the same time, he made out an invoice or bill for the lumber and delivered it to Chamberlain. The bill of lading was never in the possession of Chamberlain. Pitcher then went to the plaintiff and arranged with it to take the bill of lading and forward the car and to guarantee the amount of his bill. This the bank agreed to do, and at the same time, went to Chamberlain and had him indorse upon the invoice or bill which had been rendered the following: "Sold at \$31. Assigned to the Security State Bank for value received. Sterling Lumber Company. George H.

Chamberlain." The invoice with its indorsement was then delivered to the bank. During the negotiations of the parties, plaintiff was told that the lumber had been ordered by defendant, and consequently the bill of lading was sent to defendant on the 2d day of October, with the following letter of transmission:

"Chehalis, Wash., Oct. 2, 1909.

"O'Connell Lumber Company,

"Winlock, Wash.

"Gentlemen: We are enclosing herewith a bill of lading and invoice of shipment made by H. Pitcher for the Sterling Lumber Company on an order which Mr. Chamberlain stated was from you, and as he is sick and not able to be out, he has asked us to forward same to you. Mr. Pitcher left the bill of lading with us for collection from the Sterling Lumber Company, but we thought best to see Mr. Chamberlain and get his instructions, which were to forward the same to you and to pay Pitcher out of your remittance which we are informed is at the rate of \$31 per thousand, or \$688.63.

"Yours very truly,

"W. S. Short."

On the 7th of October defendant informed plaintiff that, in its judgment, the bank would have to look to the Sterling Lumber Company for the amount due on the invoice. At that time or shortly thereafter, defendant informed plaintiff that it had theretofore ordered two cars of lumber from Chamberlain and, on the 13th day of September, 1909, had paid the whole amount due therefor. Defendant retained the bill of lading, and the lumber was in due time delivered to the consignee, and the proceeds of the shipment were remitted to defendant. Some time thereafter the bank paid Pitcher the amount of his bill, and brought this action against defendant to recover on the original bill of lading. From a judgment in favor of the plaintiff, the defendant has appealed.

As will be seen, the controlling question is whether the payment made by the appellant to Chamberlain is a defense to this action. The answer depends upon whether title to the

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lumber ever passed from Pitcher to Chamberlain. It is contended that this fact is shown by the letter which we have heretofore quoted, in which it is stated that, "Mr. Pitcher left a bill of lading with us for collection from the Sterling Lumber Company," and by the fact that the bank took an assignment of the invoice from Chamberlain, and that the assignment recites a sale. While there may be room for argument, and, indeed, respondent has invited it by some conflicting allegations in its several pleadings, we nevertheless believe that the judgment of the trial court is sustained by the evidence. The fact that Pitcher refused to deliver the bill of lading to Chamberlain until his bill was paid or secured, notice of which fact was brought home to the appellant when the respondent transmitted the bill of lading, would seem controlling. An invoice was made out, and although the parties speak of a sale, the word cannot be taken in its technical sense so long as the conduct of the parties indicates that the sale was not absolute.

"An invoice is not a bill of sale, nor is it evidence of a sale. It is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced; . . . Hence, standing alone, it is never regarded as evidence of title." *Dows v. National Exchange Bank*, 91 U. S. 618.

When property designed for sale is loaded onto a car by a vendor, and he takes the bill of lading in his own name, a sale or delivery will not be presumed; for the bill of lading becomes a symbol of property or, as Mr. Benjamin calls it, "a document of title," and the title will not ordinarily pass until the bill of lading is surrendered. The retention of a bill of lading is in itself strong evidence of an intention to keep title in the holder, and, although as between the parties, respondent became a guarantor of the purchase price of the lumber, it was, so far as appellant is concerned, the agent of the vendor and is entitled to recover.

The right of a shipper or vendor to retain title is declared

in *Merchants' Nat. Bank v. Bangs*, 102 Mass. 291. It is there said:

"But the vendor may retain his hold upon the goods to secure payment of the price, although he puts them in course of transportation to the place of destination, by delivery to a carrier. The appropriation which he then makes is said to be provisional or conditional. He may take the bill of lading or carrier's receipt, in his own or some agent's name, to be transferred on payment of the price, by his own or his agent's indorsement to the purchaser, and in all cases when he manifests an intention to retain this *jus disponendi*, the property will not pass to the vendee. Practically the difficulty is to ascertain, when the evidence is meagre or equivocal, what the real intention of the parties was at the time. It is properly a question of fact for the jury, under proper instructions, and must be submitted to them, unless it is plain as matter of law that the evidence will justify a finding but one way."

See, also, *Farmers & Mechanics' Nat. Bank v. Logan*, 74 N. Y. 568.

In *Marine Bank of Chicago v. Wright*, 48 N. Y. 1, an advance had been made by the vendee and it was held that the shipment could not be held as against a pledgee. The court said:

"As to the advance of \$1,220: The evidence did not indisputably prove that it was made for the freight charges on this particular corn, nor that it was so applied. But if it were so, their equity would not stand against the pledge of the evidence of the title to the corn for value."

Therefore, until Pitcher had surrendered the bill of lading, the title was in him, notwithstanding he had delivered an invoice of the goods to Chamberlain. *Sears, Roebuck & Co. v. Martin*, 145 Ala. 663, 39 South. 722. We think the letter of October 2 indicates the intention of the holder of the bill of lading to make delivery of the lumber conditional on payment of its price, as much so as if a draft had been attached; and so far as the record shows, Pitcher, who is an entire stranger to appellant in this transaction, had no intention of

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surrendering title until he was paid or payment was secured.
Erwin v. Harris, 87 Ga. 333, 13 S. E. 513.

Finding no error, the judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9687. Department Two. August 10, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Frank
Nelson, Plaintiff*, v. JOHN B. YAKY, *Judge, etc.,
Respondent.*¹

JUDGES—DISQUALIFICATION — AFFIDAVIT OF PREJUDICE — EFFECT—
PRACTICE. An affidavit of prejudice, under Laws 1911, p. 617, § 1,
providing that the judge shall forthwith transfer the cause for
trial to another judge or court, does not deprive the judge of
jurisdiction until it is formally called to his notice, under the
practice of bringing pleadings to the attention of the court by no-
tice to the opposite party and notation thereof on the clerk's docket.

SAME—JURISDICTION—NOTICE TO JUDGE. A judge will not be held
to have arbitrarily held jurisdiction of a cause after an affidavit
of prejudice is filed, when there is a disputed question of fact as
to his notice thereof, and the clerk's record shows no notice.

SAME—JURISDICTION—CONSTRUCTION OF STATUTE. On filing an
affidavit of prejudice, under Laws 1911, p. 617, the trial judge has
jurisdiction to maintain the *status quo* by continuing pending hear-
ings, or setting the date for future hearings; as the statute should
not be so construed that it will operate to defeat or delay the prog-
ress of a case.

Application filed in the supreme court July 21, 1911, for
a writ of prohibition to the superior court for Kitsap county,
Yakey, J., to compel the assignment of a cause to another
judge for trial, and to prevent the making and enforcement
of certain orders therein. Denied.

Bryan & Ingle, for relator.

Jas. W. Carr, for respondent.

¹Reported in 117 Pac. 265.

CHADWICK, J.—On the 9th day of June, 1911, there was pending in the superior court for Kitsap county an action wherein Sarah Nelson is plaintiff and Frank Nelson is defendant. On that day one of the attorneys for defendant had filed a motion for a change of judge, under the act of March 18, 1911. Laws 1911, p. 617. On July 1, a supplemental affidavit was made under the same statute. On July 10, Judge Yakey, the respondent here, against whom the affidavit had been directed, granted an order restraining defendant Nelson, the relator, from going to the home occupied by plaintiff, and from in any manner harrassing or annoying her. An order to show cause why the order should not continue *pendente lite* was made returnable on July 15. On that day, the matter coming on before Judge Yakey and the objection to his jurisdiction being urged, he made an order continuing the hearing until July 31, at which time it seems to be conceded that another judge was to be called in to hear and determine the matter then pending. At this point, the controversy, of which the Nelson case is but an incident, was brought to this court upon the application of the relator for a writ of prohibition, with incidents having the character of mandamus, as will be seen by reference to his prayer:

“(1) To make an order forthwith assigning the said cause of Sarah Nelson, plaintiff, vs. Frank Nelson, defendant, to some other judge for trial.

“(2) To cancel and hold for naught that certain restraining order and show cause made in said action on July 10, 1911, and thereafter continued on July 15, 1911.

“(3) To command the said judge to desist from making or enforcing or attempting to make or enforce any order or orders in the said cause.”

The cause came on for hearing before us on August 4, and from the affidavits and return we find that this proceeding arises out of a dispute of fact.

The attorneys for the relator insist that the Nelson case was called by the court on June 26, at which time respondent's attention was called to the affidavit of prejudice, and he

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then said that he would not make a definite ruling, but would probably grant a change of venue in all cases where such affidavits had been filed; that notwithstanding such ruling, the court did make the show-cause order even after the supplemental affidavit of prejudice had been made. The conduct of the attorneys for relator seems to have been consistent with the idea that they believed their motion had been called to the attention of the court. On the other hand, the return of the respondent shows, and in this he is supported by the silence of the clerk's record, that the Nelson case was not specially called to his attention, and that no order was made therein, and that at the time he made the show-cause order the motions for a change of judge had not been heard; that when they were brought to his notice, he at once disclaimed any purpose of participating in the case, and continued the case until another judge could be called in. The respondent is supported in his statement by the clerk's minutes, or rather by the lack of any minute or journal entry showing a hearing on June 26. Hence, we are called upon to construe the statute above cited, section 1 of which reads as follows:

"No judge of a superior court of the state of Washington shall sit to hear or try any action or proceeding when it shall be established, as hereinafter provided, that such judge is prejudiced against any party or attorney, or the interest of any party or attorney appearing in such cause. In such case the presiding judge shall forthwith transfer the action to another department of the same court, or call in a judge from some other court, or apply to the governor to send a judge, to try the case; or, if the convenience of witnesses or the ends of justice will not be interfered with by such course, and the action is of such a character that a change of venue thereof may be ordered, he may send the case for trial to the most convenient court." Laws 1911, p. 617, § 1.

The power of the judge against whom the affidavit is directed is the first question to consider. Under the practice prevailing in this state, of bringing the pleadings and files in a case to the attention of the court by notice to the oppo-

site party and a notation thereof on the court's docket, it must be held that, until the affidavit of prejudice is formally called to the attention of the judge, he may, with all propriety, proceed to make any order which in his judgment is proper to be made. However, after the affidavit has been brought to the attention of the judge, his power to proceed, and the limit of his power finds bounds in the statute, he can only "forthwith transfer the action to another department," etc. Under the record here presented, the parties differing radically as to the fact, we cannot hold, in the light of the clerk's record and the order of July 15, that respondent has acted arbitrarily or with any desire to hold jurisdiction over the objections of the relator.

The next question is, Did the respondent have jurisdiction—the motion for a change of judges having been brought to his attention on July 15—to continue the temporary restraining order until it could be heard by another judge? Our former discussion would seem to be a sufficient answer, for manifestly, his power to act not having been arrested at the time the order was made, he would have the right to hold the parties and their property, if subjected to the jurisdiction of the court *in status quo* until the merit of the controversy could be tried by another. To hold otherwise would be to put it in the power of any litigant to defeat an order of the court formally entered, by attacking the fairness of the judge under the new statute.

Nor do the terms of the statute seem to warrant us in holding (whatever its design may have been) that the judge impugned could not make an order setting the case or any proceeding incidental thereto down for hearing at some future date. In the arguments of counsel too much importance is attached to the word "jurisdiction." The jurisdiction of the judge or of the court is not destroyed by the affidavit of prejudice. Giving it the sense in which it is here used, it does no more than arrest the power of the judge to pass upon

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an issue or the merits of the case. It follows that we cannot hold that the respondent is guilty of any abuse because of his order continuing the show-cause order until July 31.

It is complained that July 31 has come and gone and no judge appeared to try the case; but for this there may be, indeed the record suggests, a sufficient reason, for the prayer of relator's petition asks us to hold for naught respondent's show-cause order of July 10. It was a hearing upon this order that was set for July 31, and it no doubt occurred to the respondent that it would be idle to call another judge at a time when the effect of the order, as well as the order itself, had been brought to this court upon relator's application.

Finding, as we do, that the respondent has kept within the bounds of the statute, relator's petition is denied, and the cause is remanded with instructions to respondent to fix a new date for hearing the order to show cause, and to call another judge to hear the same.

This statute is novel and introduces a new rule of practice. Like almost all instruments designed for protection, the statute may be subject to abuse. We feel warranted, therefore, in saying that we are not disposed to give it a construction that will operate to defeat or delay the progress of a case in those counties where there is but one judge. When the motion is made, the judge should in all cases carefully consider that provision of the law wherein it is said, "if the convenience of witnesses or the ends of justice will not be interfered with . . . and the action is of such a character that a change of venue may be ordered, he [the local judge] may send the case for trial to the most convenient court;" for we may take judicial notice that it is not always convenient for a superior judge to do the bidding of another, or of the governor. More than this, the public has an interest in the dispatch of litigation, and to hold that a judge must journey from his own court to hear every motion, de-

murrer, or application for an order would tend to intolerable delay; and, if a case in its progress were handled by several judges, as it might be, to insufferable confusion.

Writ denied.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9342. Department One. August 10, 1911.]

GEORGE SEWARD, *Administrator, etc., Respondent*, v.
SPOKANE, PORTLAND & SEATTLE RAILWAY COMPANY,
Appellant.¹

ABATEMENT AND REVIVAL—DEATH OF PARTY—TRESPASS—ACTS CONSTITUTING. A railroad fill upon a street changing the grade and interfering with access, to the damage of the abutting owner of improved property, who owns the fee of the street, is a trespass, for which the right of action survives, under Rem. & Bal. Code, § 1536, providing that executors and administrators may maintain actions for trespass committed on the estate of the deceased during his lifetime.

Appeal from a judgment of the superior court for Clarke county, McMaster, J., entered June 15, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for damages to real property. Affirmed.

Cary & Kerr, A. L. Miller, and Omar C. Spencer, for appellant. The action did not survive to the administrator under the common law. 1 Cyc. 50, note 59; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783, 31 Pac. 329, 31 Am. St. 948. The action did not survive under the English statutes modifying the common law doctrine. Stat. 4 Edw. III; Stat. 3 and 4 William IV; *Texas & N. O. R. Co. v. Smith*, 35 Tex. Civil App. 351, 80 S. W. 247. The cause did not survive under Rem. & Bal. Code, § 1536, because: (1) Causing surface water to flow on the adjacent land of the

¹Reported in 117 Pac. 263.

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Citations of Counsel.

decedent was not a trespass. *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. 881; *Hicks v. Drew*, 117 Cal. 305, 49 Pac. 189; *Roundtree v. Brantley*, 34 Ala. 544, 73 Am. Dec. 470; *Holly v. Boston Gaslight Co.*, 8 Gray 123, 69 Am. Dec. 233; *Cooper v. Hall*, 5 Ohio 321; *Daneri v. Southern Cal. R. Co.*, 122 Cal. 507, 55 Pac. 243.

(2) The interfering with the ingress to and egress from the adjoining real property was not a trespass. *Osborne v. Butcher*, 26 N. J. L. 308; *Bale v. Todd*, 123 Ga. 99, 50 S. E. 990. The proper remedy for injury to or disturbance of an easement is an action on the case, and not trespass; interference with an easement is not a trespass. 14 Cyc. 1216; *Wetmore v. Robinson*, 2 Conn. 529; *Shafer v. Smith*, 7 Harr. & J. (Md.) 67; *Lambert v. Hoke*, 14 Johns (N. Y.) 383; *Martin v. Bliss*, 5 Blackf. (Ind.) 35, 32 Am. Dec. 52; *Tuttle v. Walker*, 46 Me. 280; *Bowers v. Suffolk Mfg. Co.*, 4 Cush. 332; *Carleton v. Cate*, 56 N. H. 130; *Smith v. Wiggin*, 48 N. H. 105; *Shroder v. Brenneman*, 23 Pa. St. 348; *Greenwalt v. Horner*, 6 Serg. & R. 71; *Wilson v. Wilson*, 2 Vt. 68.

P. J. Kirwin, for respondent, contended, among other things, that the general doctrine in the United States is that all causes of action arising for injuries to real estate survive. 21 Ency. Plead. & Prac., p. 333; 28 Am. & Eng. Ency. Law (2d ed.), p. 580; Pomeroy, Remedies and Rem. Rights, 147; *Henderson v. Henshell*, 54 Fed. 320; *Great Western Min. & Mfg. Co. v. Harris*, 96 Fed. 503; *Texas & N. O. R. Co. v. Smith*, 35 Tex. Civ. App. 351, 80 S. W. 247. All damages which are the direct and natural result of an act of trespass may be recovered in an action of trespass. *Percival v. Hickey*, 18 Johns. 257; *Perry v. Carr*, 44 N. H. 118; *Chicago & N. W. R. Co. v. Hoag*, 90 Ill. 339, 12 N. E. 185; *Williams v. Missouri Furnace Co.*, 13 Mo. App. 70; *Garrett v. Sewell*, 108 Ala. 521; *G. B. & L. R. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696; *Stevens v. Stevens*, 96 Ga. 374, 23 S. E. 312; *Gray v. Waterman*, 40 Ill. 522; *Corner v. Mackintosh*,

48 Md. 374; *Redemptorists v. Wenig*, 79 Md. 348, 29 Atl. 667; *Allison v. Chandler*, 11 Mich. 542; *Welch v. Piercy*, 29 N. C. 365; *Damron v. Roach*, 23 Tenn. 134; *Wendel v. Spokane County*, 27 Wash. 121, 67 Pac. 576, 91 Am. St. 825. The disturbance of an occupant as in this case is a trespass. *Conner v. Woodfill*, 126 Ind. 85, 25 N. E. 876, 22 Am. St. 568; *Lord v. Meadville Water Co.*, 135 Pa. St. 122, 19 Atl. 1007, 20 Am. St. 864, 8 L. R. A. 202.

MOUNT, J.—The plaintiff, as administrator, brought this action against the defendant, to recover damages to real estate belonging to Orson M. Seward in his lifetime. The cause was tried to the court and a jury. The trial resulted in a verdict for the plaintiff for \$650. Thereafter motions for a new trial and for a judgment *non obstante veredicto* were denied, and judgment was entered upon the verdict. The defendant has appealed.

It appears that, in the year 1907, the defendant constructed a railway through a block of land and across Seventh street, in the city of Vancouver. The railroad at the street crossings was nearly five feet above the street grade. The city granted the railroad company the right to fill the street so as to make a crossing upon the railway track. This fill was made. It was deepest at the railway crossing, and extended each way therefrom by gradual descent to the original street grade. Orson M. Seward at that time owned two lots, fifty by one hundred feet each, on the north side of Seventh street. A part of the fill was made in front of these lots. The fill was about one foot high at the corner, and about two and one-half or three feet higher at the point nearest the railway. These lots were improved, being occupied by three dwelling houses. Mr. Seward died on November 30, 1908. This action was brought in October, 1909. It was claimed by the plaintiff that ingress to and egress from the property was cut off by the fill and embankment in the street, and that water was caused to flow and remain upon the property by

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reason of the embankment, and that the property was damaged thereby.

There is but one question presented here, viz., the right of the administrator to recover for damages which occurred to the property during the lifetime of the decedent, and more than six months prior to his death. We do not understand that the appellant claims that the action is barred if it survives to the administrator; but the argument is that there is no survivor either at common law, the English statutes, or under the code of this state. Rem. & Bal. Code, § 1536, provides that:

“Executors and administrators may maintain actions . . . for trespass committed on the estate of the deceased during his lifetime.”

Appellant argues that the fill upon the street in front of the lots was not a trespass within the meaning of this statute, even if such fill has the effect to interfere with the egress from and ingress to the property, and causes water to flow thereon. *Suter v. Wenatchee Water Power Co.*, 35 Wash. 1, 76 Pac. 298, 102 Am. St. 881, is cited and relied upon as sustaining that position. That case, no doubt, does sustain the position of the appellant in so far as it holds that, where one constructs lawful structure on his own lands and thereby causes injury to another, a cause of action is in case and not in trespass at the common law. But we do not desire to extend the doctrine of that case to cases such as this. It seems to us that the injury here was direct, and not consequential as was the case there. It is true that the defendant had authority from the city to make the fill in the street, but the city could grant to defendant no greater right than the city possessed. The city had no authority to change or to authorize a change in the street grade without paying the damages to the abutting owner, where improvements had been made with reference to the original grade. *Hart v. Seattle*, 42 Wash. 113, 84 Pac. 640, and cases there cited. The fee of the street on which the fill was made was in Mr. Seward,

the owner of the abutting property. *Simons v. Wilson*, 61 Wash. 574, 112 Pac. 653; *Holm v. Montgomery*, 62 Wash. 398, 113 Pac. 1115. In the case last cited, we said:

“Where this rule obtains, it is as well settled that the owner of the abutting property may make such use of the land within the highway as will not interfere with its use for public travel, and that it is a trespass against the owner of abutting property to make excavations in the highway, or otherwise disturb its use as a public highway.”

The fill made by the defendant in the street is, therefore made upon a part of the improved property of Mr. Seward; hence, was a direct trespass. The damage resulting was immediate and not consequential, the same as though the defendant had gone within the lot line and made a fill therein. We are satisfied that the trespass was one within the statute above quoted, and that the cause of action survived to the administration.

The judgment is therefore affirmed.

DUNBAR, C. J., GOSE, and FULLERTON, JJ., concur.

[No. 9485. Department One. August 10, 1911.]

N. T. NASLUND, *Respondent*, v. SVEA INSURANCE COMPANY,
Appellant.¹

INSURANCE—CANCELLATION OF POLICY—EVIDENCE—QUESTION FOR JURY. Upon a direct conflict in the evidence as to whether a fire insurance policy had been cancelled before the fire, the matter depending upon the credibility of the witnesses, the question is for the jury.

NEW TRIAL—CONFLICTING EVIDENCE—REASONS FOR DENIAL. The denial of a new trial, with expressions indicating that the trial judge would have arrived at a different conclusion, is not error, where the court did not indicate that the verdict was not sustained by the evidence, but only that he was in doubt about it.

¹Reported in 117 Pac. 264.

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Appeal from a judgment of the superior court for Snohomish county, Black, J., entered September 17, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a policy of fire insurance. Affirmed.

H. A. P. Myers and *Granger & Clarke*, for appellant.

S. A. Bostwick and *Andrew Johnson*, for respondent.

MOUNT, J.—The plaintiff brought this action to recover upon a policy of fire insurance. The complaint alleged, that the defendant issued to the plaintiff a certain policy of insurance covering a stock of goods belonging to the plaintiff, in Everett, Washington, which policy insured the plaintiff against loss by fire to the extent of \$1,500; that the goods were wholly destroyed by fire on August 2, 1909, while said policy was in force, and plaintiff's loss by reason of the fire was in excess of \$1,500. Defendant's answer admitted the execution of the policy, but alleged affirmatively that the plaintiff, prior to the fire, surrendered and ordered the cancellation of the policy; that in pursuance of such order the policy was cancelled, on July 22, 1909, prior to the date of the fire. Plaintiff denied the cancellation of the policy. This issue of fact was the only one in the case. All the other facts were admitted. The case was tried to the court and a jury. The trial resulted in a verdict in favor of the plaintiff. The defendant thereupon filed a motion for a judgment *non obstante veredicto*, and also a motion for a new trial. These motions were overruled by the trial court, and a judgment was entered upon the verdict. The defendant has appealed.

It is argued that the court erred in denying these motions. There is abundant evidence in the record to support a verdict upon either side. The evidence offered by the defendant shows that the policy was cancelled and a complete settlement had between the parties on July 22, 1909, and that the fire occurred on August 2, 1909. The evidence offered by the plaintiff shows that the policy was not surrendered

for cancellation, but was in force at the time of the fire; and in order to account for the fact that the policy was in possession of the agent of the defendant at the time of the fire, the plaintiff's daughter testified that, soon after the policy was delivered to the plaintiff, she took the same, by direction of her father, to place it in a bank for safe keeping; that while on her way to the bank, she called at the office of the agent of defendant to make a collection from him, and there by mistake left the policy, where it remained until after this action was begun. There was a direct conflict in the evidence upon the question of the cancellation of the policy; so that, when the case was finally submitted, the jury was required to find that the witnesses for one side or the other were entirely mistaken or had testified falsely. The case was therefore clearly one for the jury, and the court did not err in refusing to enter a judgment *non obstante*.

In passing upon the motion for a new trial, the trial judge indulged in much talk upon what he conceived the rule to be in cases of this kind. He also indulged in some criticism of this court, and said that, if he had been trying the facts, he might have arrived at a conclusion different from the one arrived at by the jury; and gave the inference that he probably would have done so. Counsel for the appellant now insist that, because the trial court was convinced that the verdict of the jury was wrong, it was his duty to set it aside, under the rule in *Clark v. Great Northern R. Co.*, 37 Wash. 537, 79 Pac. 1108. We have carefully read the evidence and the statements made by the trial court, and we are not satisfied that the court was of the opinion that the verdict was not sustained by the evidence, or was against the weight of the evidence; and for that reason the case is not controlled by the cases cited. The trial court evidently had some doubts that the verdict was a correct one; as we have. But he did not say, and we think did not mean to infer, that the verdict was in his opinion not sustained by the evidence, or was con-

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trary to the weight of the evidence. He meant simply that he was in doubt upon that question.

The judgment must therefore be affirmed.

DUNBAR, C. J., and GOSE, J., concur.

FULLERTON, J., concurs in the result.

[No. 9508. Department One. August 10, 1911.]

FLORENCE H. NEAL *et al.*, *Respondents*, v. PHOENIX LUMBER
COMPANY, *Appellant*.¹

PLEADING—SUFFICIENCY OF COMPLAINT—BILL OF PARTICULARS—ACTION FOR DEATH—DISCRETION. It is not an abuse of discretion to refuse to order a bill of particulars as to the negligent construction of a penstock of a mill, alleged to be such that the penstock would not withstand the pressure of high water when it was empty, where the defendant had owned it for twelve years and knew the manner of its construction, especially in an action for death caused thereby.

MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE OF MASTER—EVIDENCE—QUESTION FOR JURY. It is for the jury to determine whether the exercise of reasonable care required the owner of a mill to anticipate that unusually high water, an empty penstock which was structurally defective, and an employee in the wheel pit might occur at the same time, where the penstock was not constructed so as to withstand the pressure of water from without when the water was high and the penstock was empty in that there were no inside upright timbers bracing planks nailed to timbers on the inside, the defendant had owned the mill twelve years, and reasonable care would have ascertained the structural insufficiency of the penstock.

SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY. In such a case, whether the foreman and millwright of the mill assumed the risks, or was in the exercise of reasonable care in entering the penstock, is for the jury, where it appears that he was not employed when the mill was originally constructed, and was not an engineer, but had gained his knowledge by experience only, and there was no evidence that he

¹Reported in 117 Pac. 267.

knew the pressure exerted by the water or the resisting power of the timbers; since he will not be presumed to have known the danger from the physical facts with no knowledge of mechanics.

DEATH—DAMAGES—EXCESSIVE VERDICT. A judgment of \$13,500 for the death of a millwright, thirty-six years of age, in good health, earning about \$1,400 a year, leaving a widow twenty-six years of age and a daughter seven years of age, is not excessive.

DEATH—DAMAGES—INSTRUCTIONS. In an action for the wrongful death of a father, leaving a minor daughter, an instruction as to the measure of damages accruing to the daughter until she becomes of age is not erroneous where the language carries with it the implied provision that she shall live until that time.

MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO INSPECT. In an action for the death of a millwright whose duty it was to keep the mill in repair, it is proper to refuse an instruction to the effect that it was his duty to inspect and make necessary changes respecting the original system of construction of a penstock, when he was not a constructor or hydraulic engineer.

Appeal from a judgment of the superior court for Spokane county, Webster, J., entered December 20, 1910, upon the verdict of a jury rendered in favor of the plaintiffs, in an action for the death of an employee in a mill, drowned in the wheel pit through the negligent construction of the penstock. Affirmed.

Post, Avery & Higgins, for appellant.

Graves, Kizer & Graves, for respondents.

Gose, J.—The plaintiffs are respectively the widow and minor daughter of Charles Neal, deceased. Charles Neal was drowned in the wheel pit at the defendant's mill, while in its employ, on April 2, 1910. It is charged that he lost his life in consequence of the negligence of the defendant. There was a verdict and judgment in favor of the plaintiffs for \$13,500. The defendant has appealed.

Succinctly stated, the complaint alleges that the appellant corporation is engaged in the operation of a sawmill, the motive power being furnished by the waters of the Spokane river, conducted through a flume into a penstock, thence

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through another flume upon turbine wheels which, through the power of the water, operates the machinery of the mill; that the construction of the penstock was negligent, unscientific, and improper in its original design and its construction, in that it was not built so as to resist the force of the waters from without when the river was high and the penstock was empty; that it became the duty of the deceased, in the discharge of his duties as a millwright, to enter the wheel pit in order to repair the wheels; that to do so he closed the gates of the flume for the purpose of emptying the penstock and wheel pit, and that, while repairing the wheels, the penstock gave way in consequence of the pressure of the water of the river from without, immediately causing his death by drowning.

Before answering, the appellant moved the court to require the respondents to furnish a bill of particulars showing in what respect the penstock was negligently or improperly or unscientifically constructed. The denial of this motion suggests the first error claimed. The granting or refusing a bill of particulars rests in the sound discretion of the court, and its conclusions will not be disturbed except for abuse of discretion. *Turner v. Great Northern R. Co.*, 15 Wash. 213, 46 Pac. 243, 55 Am. St. 883. The rule stated is peculiarly applicable where the suit is waged by the heirs or personal representatives of a deceased person. *Donohue v. Meares*, 19 N. Y. Supp. 585. The ultimate fact alleged is that the penstock was so negligently constructed that, when it was emptied and the river was high, it would not and did not withstand the pressure of the water, and that the deceased, while in the discharge of his duty, came to his death in consequence of such defective construction. We think the appellant was sufficiently advised of the negligence relied upon for a recovery. It had owned and operated the plant for about twelve years. Its mill is situated upon and across the south channel of the Spokane river. It knew that the penstock was made of wooden material, formed by nailing heavy plank on

the inside of large vertical timbers, and that there were no inside upright or cross timbers.

At the close of respondents' evidence, the appellant moved for a nonsuit; and at the close of all of the evidence, it moved for a judgment. The denial of these motions is the next error suggested. It is said that the evidence does not tend to show, (1) that the appellant knew, or by the exercise of reasonable care could have known, of the fact that the penstock was not constructed to withstand the pressure of the water from without when the river was high and the penstock was empty; and (2) that it does not tend to show that the deceased did not know, or in the exercise of reasonable care could not have known, of the weakness of the penstock in that respect. These suggestions necessitate a brief statement of the facts disclosed by the record.

The appellant acquired the mill by purchase in 1898, had it examined and somewhat remodeled, and thereafter operated it without accident, so far as the record discloses, until the happening of the accident involved in this suit. There is no evidence that any change was made or suggested in the flume or penstock. The Spokane river has its source in Lake Coeur d'Alene, which is fed by mountain streams, and is therefore subject to sudden rises. The south branch of the river, upon which the mill is situated, was somewhat higher on the last of March, 1910, than it had theretofore been known. The waters were receding on the second of April when the accident happened. The mill had then been shut down for about ten days to await a subsidence of the waters and the repair of the wheel. The waters of the main channel of the river were some two feet higher in 1894 than in 1910. A short distance above the appellant's mill, the river divides, forming what is termed the north and south channels. The presence of a wingdam in the main channel and the closing of a branch of the south channel, which formerly flowed into the north channel at a point above the appellant's mill, were facts known to the appellant before the accident, and caused the south

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channel to carry more than its proportion of the waters of the river. The appellant's manager knew that the deceased was intending to empty the penstock and wheel pit for the purpose of repairing the wheel.

The flume is twenty-seven feet in width at the intake, fifteen and one-half feet at the penstock, and has a depth of nine feet. The penstock extends twelve feet below the bottom of the flume, giving it a depth altogether of about twenty-one feet. The dimensions of the penstock are fifteen and one-half by seven and one-half feet. All the measurements stated are inside measurements. The framework of the penstock consists of timbers 14 by 14, and 12 by 12, placed two feet apart, outside measurement, and sustained by truss rods or braces. Planks were nailed to the inside of these timbers. The first five planks from the bottom, where the greatest pressure was exerted, were 4 by 12. The remainder were three-inch plank. The cylindrical flume leading from the penstock to the wheel pit and the wheels is about 8 by 9 feet. The waters of the river were running over the top of the flume on the day of the accident.

The evidence of the civil engineers shows conclusively that the penstock was not constructed so as to withstand the pressure of the water from without when the river is high and the penstock is empty, in that there were no inside upright timbers or cross-beams or braces. The deceased knew of the physical facts, except the force exerted by the pressure of the water and the resisting power of the penstock from the force without. He was not a constructor or hydraulic engineer. He commenced working in a mill as a common laborer when he was sixteen years of age. He began working for appellant as a trimmer in 1898, and continued at that work for three years. He then worked for it as an edger man for four or five years, when he became its foreman and millwright, continuing in that capacity until his death. He had been foreman for about four or five years. It was his duty to see that the mill flume and penstock were kept in

repair. But it was not his duty to have the plant inspected with a view to determining its structural sufficiency.

From the facts stated it is obvious that the jury were warranted in finding that the appellant, by the exercise of reasonable care, could have ascertained the structural insufficiency of the penstock before the happening of the accident. This is made clear from the evidence of the civil engineers. Nor does the fact that the south branch of the river was higher than it had theretofore been known relieve it as a matter of law. It knew, as we have said, that the south channel was carrying more than its proportion of the waters of the river, and it was a question for the jury whether, knowing that fact, it had exercised the care that reasonable prudence required considering the forces surrounding it. It is true, as the appellant states, that it is not an insurer of the safety of the instrumentalities which it employs. However, the jury, we think, were warranted in concluding that an exercise of reasonable care upon its part required it to anticipate that it might become necessary to empty the penstock when the river was at its flood for the purpose of repairing the wheels. That work could only be done when there was no water in the penstock or wheel pit. Indeed, it knew that fact at the time the deceased entered the wheel pit to repair the wheel preparatory to putting the mill into operation. It was for the jury to determine whether the exercise of reasonable care required the appellant to anticipate that high water, an empty penstock, and an employee in the wheel pit, might occur at the same time. The death of the deceased cannot be attributed, as a matter of law, to accident, or to unusual or extraordinary causes which an employer, exercising reasonable care, considering the surrounding forces, could not have anticipated.

“It is well settled that an employer is presumed to be familiar with the dangers, latent as well as patent, ordinarily accompanying the business in which he is engaged. . . This doctrine requires him to take notice of the normal charac-

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teristic properties of the material substances which he uses, and the physical and mechanical laws which operate upon them." 1 Labatt, Master and Servant, § 129a.

"For injuries caused by his failure to foresee the results of the operation of natural laws which he is presumed to comprehend the master is liable, even though such results may be of an unusual character." Id., § 141.

See, also, *Chicago, M. & St. P. R. Co. v. Riley*, 145 Fed. 137; *Latorre v. Central Stamping Co.*, 9 App. Div. 195, 41 N. Y. Supp. 99; *Scagel v. Chicago, M. & St. P. R. Co.*, 83 Iowa 380, 49 N. W. 990.

The true criterion is stated in *Wabash St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 14 N. E. 391, 2 Am. St. 193, cited by the appellant:

"The rule deducible from the authorities is cases analogous to the present is, that in order that liability shall attach for an injury occasioned by something not inherently dangerous and defective, which is found upon the ground of, or in use by, one who is under a qualified obligation to the injured person, it must be shown that the defendant either knew, or that, by the exercise of such reasonable skill, vigilance and sagacity as are ordinarily possessed and employed by persons experienced in the particular business to which the thing pertains, he should have known of its defective and dangerous condition, and that the natural and probable consequence of its use would be to produce injury to some one."

The difficulty lies in the application of the rule. The appellant argues that this question should be ruled in its favor by the court as a matter of law, whilst we think that the facts of the case warranted its submission to the jury. As was said in *Koontz v. Chicago etc. R. Co.*, 65 Iowa 224, 21 N. W. 577, 54 Am. Rep. 5, also cited by the appellant: "Ordinary care does not require that every possible contingency must be anticipated and guarded against, but only such as are likely to occur." And as was said in *Carter v. Cape Fear Lumber Co.*, 129 N. C. 203, 39 S. E. 828:

"It is right that one should be required to anticipate and guard against consequences that may be reasonably expected

to occur, but it would be violative of every principle of law or justice if he should be compelled to foresee and provide against that which no reasonable man would expect to happen."

In answer to a special interrogatory the jury found that the penstock broke because of its faulty construction. The evidence of the civil engineers is that the penstock when empty could not reasonably be expected to withstand the pressure of the water around it, even at low water.

The next question is more difficult, viz., was the deceased, as foreman of the mill, in the exercise of reasonable care, required to know of the structural weakness of the penstock. We think that, under the facts stated, this was a question for the jury. He was not an engineer. Such knowledge as he had was acquired in the school of experience. There is no evidence showing, or tending to show, that he knew either the pressure exerted by the water or the resisting power of the timbers. The jury might well have found that, when he became foreman of the mill, he had a right to assume the structural sufficiency of the plant in all its parts, in the absence of patent defects; and none such are claimed to have existed. It was his duty to use reasonable care to maintain the efficiency of the plant. But it was not his duty to employ engineers to inspect it with a view of ascertaining whether it had been scientifically constructed. If he had permitted the penstock to deteriorate and his death had resulted from that cause, the negligence would have been his and there could be no recovery. He assumed the risk of dangers that were patent, but he did not assume the risk of those that were latent and unknown to him and not arising from deterioration. He knew the physical facts, but having no knowledge of mechanics he will not be presumed to have known the danger that beset him when he met his death. 1 Labatt, Master and Servant, § 279a; *Shoemaker v. Bryant Lumber & Shingle Mfg. Co.*, 27 Wash. 637, 68 Pac. 380; *Pearson v. Federal Min. etc. Co.*, 42 Wash. 90, 84 Pac. 632; *Meshishnek v. Se-*

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attle Sand & Gravel Co., 51 Wash. 382, 99 Pac. 9; *Ward v. National Lumber & Box Co.*, 54 Wash. 304, 103 Pac. 1; *Galveston etc. R. Co. v. Smith*, 24 Tex. Civ. App. 127, 57 S. W. 999; *Wagner v. Jayne Chemical Co.* 147 Pa. St. 475, 23 Atl. 772, 30 Am. St. 745; *Davidson v. Cornell*, 132 N. Y. 228, 30 N. E. 573; *Eddy v. Aurora Iron Min. Co.*, 81 Mich. 548, 46 N. W. 17; *Texas & Pac. R. Co. v. Archibald*, 170 U. S. 665.

What we have said touching the question of assumption of risk disposes of the question of contributory negligence. Not knowing the risk, the deceased did not assume it, and he was not guilty of contributory negligence in working at a place which he did not know, or in the exercise of reasonable care could not have known to be dangerous.

As already suggested the jury returned a verdict for \$13,500, and a judgment was entered for that amount. The appellant asserts that the amount is excessive. The deceased was thirty-six years of age, in good health, earning about \$1,400 a year, and had a life expectancy of about thirty-one years at the time of his death. His widow was twenty-six years of age and his daughter seven years of age. We do not think the damages awarded are excessive. *Walker v. McNeill*, 17 Wash. 582, 50 Pac. 518; *Harris v. Puget Sound Elec. R.*, 52 Wash. 289, 100 Pac. 838; *Walters v. Spokane International R. Co.*, 58 Wash. 293, 108 Pac. 593.

The court instructed the jury relative to the rights of the minor daughter as follows:

“You will then consider from all the facts and circumstances in the case what sum of money he would probably have expended in the care, support, maintenance and education of the minor child, Marguerite M. Neal, from the period of his death until said Marguerite M. Neal should have arrived at the age of eighteen years. You will likewise consider the care, attention, advice and training which he would probably have given her from the time of his death until she reached the

age of eighteen years, and determine what the pecuniary value of that for that period of time would be to her."

In criticism of this instruction, it is said that it assumes that she will live until she is eighteen years of age. The argument is technical. We think the language carries with it the implied provision that the daughter shall live to that age. The jury knew as well as the court the uncertainty of human life, and no doubt read such an exception into the instruction. The intelligence and fairness of the jury must be assumed, or trial by jury becomes farcical. *State v. Williams*, 62 Wash 286, 113 Pac. 780; *Chicago, M. & P. S. R. Co. v. True*, 62 Wash. 646, 114 Pac. 515; *Merrill v. Stevens & Co.*, 61 Wash. 28, 112 Pac. 353; *Andrews v. Chicago, M. & St. P. R. Co.*, 86 Iowa 677, 53 N. W. 399; *Texas & Pac. R. Co. v. Yarbough* (Tex. Civ. App.), 73 S. W. 844.

Error is assigned in the refusal of the court to give the following instruction:

"If you find from the evidence that the deceased Neal was the foreman of, and in charge of the mill, with authority and charged by his employer with the duty to inspect and make any and all necessary or proper changes or repairs to secure and preserve safety to himself and others in respect to said flume and penstock, and that he failed to do this, and as a direct result thereof, the accident in question occurred, defendant is not liable, and if you so find from the evidence, you will return a verdict for the defendant."

The instruction, so far as applicable to the evidence, is covered by the instructions given. As we have pointed out, the appellant knew that the deceased was not a skilled constructor or hydraulic engineer. The accident happened not because the deceased failed in his duty to keep the penstock in repair, but solely in consequence of gross negligence in its construction. The facts in the case at bar distinguish it from *Woelflen v. Lewiston-Clarkston Co.*, 49 Wash. 405, 95 Pac. 493. There are numerous other criticisms of the instructions given, and of the failure of the court to give requested in-

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structions, but as we view them they are all technical and do not require separate discussion. The jury was fully, clearly, and fairly advised that the appellant is not an insurer of the safety of its appliances; that it was not required to guard against dangers not reasonably to have been anticipated; but that the standard of its duty was to be measured by the conduct of the reasonably prudent man considering the forces surrounding it and the circumstances of the case. As to the deceased, the jury were instructed that he assumed the ordinary and usual risks incident to and arising out of his employment, but that he was not bound to investigate for defects in the construction of his employer's work, nor to pass judgment on the system of construction. They were, however, further instructed that, if he knew of the defects, either in design or construction of the appliances, or if they were open and obvious, he assumed the risk arising from such known dangers.

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, and MOUNT, JJ., concur.

[No. 9464. Department Two. August 10, 1911.]

JAMES WILSON, *Respondent*, v. CAIN LUMBER COMPANY,
Appellant.¹

MASTER AND SERVANT—SAFE APPLIANCES—RAILROAD CARS—DUTY TO INSPECT. A lumber company operating a logging road and taking cars turned over to it by a railroad company to load on its own tracks, is bound to take notice of a defect in a brake rod that was patent or might be discoverable by the exercise of reasonable diligence, but is not liable for an injury to an employee by the breaking of the rod if the defect would not have been discovered by a reasonable inspection.

SAME—NEGLIGENCE OF INSPECTION—SUFFICIENCY. In an action for injuries to a brakeman through the breaking of a brake rod, a verdict for plaintiff is not sustained by any sufficient evidence that a

¹Reported in 117 Pac. 246.

lumber company, taking a car with a defective brake rod from a railroad to load on its own tracks, could have discovered the defect by a reasonable inspection of the rod, where it appears that the rod broke under the application of physical force to set the brake, that the rod had been previously broken and welded at the same place, no witness saw the rod before the accident, and the sum of the expert evidence was that an inspection would have shown the weld and that there might have been a visible crack, and no custom or method of inspection was shown (DUNBAR, C. J., and CROW, J., dissenting).

Appeal from a judgment of the superior court for Whatcom county, Hardin, J., entered June 30, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a brakeman on a logging road. Reversed.

Roberts, Battle, Hulbert & Tennant and Waters & Downer, for appellant.

Neterer & Pemberton, for respondent.

CHADWICK, J.—Plaintiff was employed as a brakeman and fireman on a logging road operated by defendant. A spur about 1,100 feet long had been built from the main line to a landing, where logs were loaded on flat cars. The cars were furnished by the Northern Pacific Railway Company, and were by it switched onto a spur known as Casey's Spur, upon which they were picked up by defendant's crew. The spur first mentioned was of a temporary character, rough and unballasted, and was laid over a little knoll, the top of which was about 200 feet, or five or six car lengths, from the landing, as estimated by the witnesses. On the morning when plaintiff was injured, the crew, consisting of plaintiff and the engineer, were moving out three cars to be spotted at the landing for loading by the loading crew. On the top of the knoll there was a drop or a rough place in the track, so that, in passing over it, the cars became uncoupled from the engine and started down the track toward the landing. The engineer whistled a signal to set the brakes, and appellant

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went to the end of the third car, being the head end as they were moving, for the train had been backed in, and undertook to set the hand brake. He took hold of the brake wheel and turned it so as to take up the slack, then, bracing his foot against the latch, he attempted to set the brake, when the brakestaff broke in two about eighteen inches from the top. Plaintiff's attitude was such that he lost his balance and fell in front of the cars, and in attempting to recover himself, was thrown under the car, so that the front trucks passed over his body, breaking his leg and injuring his left hand. The accident happened just as it was coming daylight. Plaintiff brought this action to recover damages, and from a verdict in his favor, defendant has appealed.

The only negligence relied on is the defective breakstaff. This had been previously broken and welded together. The theory of the plaintiff was most aptly summarized by his counsel when, at the close of the case, he asked permission to amend his complaint. We shall adopt his words:

"If the court please, we ask leave of the court to amend the complaint in this case so as to conform to the testimony in this: That there be added to paragraph 7 of the complaint, in addition to the improper weld and the other allegations in that paragraph, that the brakestaff had been broken partially at the place where it was attempted to be welded and that this break was open and apparent to the defendant and the defendant had notice of this break or should have known, and that this break in the breakstaff so weakened the brakestaff as to make it an unsafe appliance for the purpose for which it was designed and used."

That the brakestaff was defective is not denied; but defendant maintains that, the cars being turned over to it for a specific purpose by the Northern Pacific Railway Company, no duty of inspection rested upon it, and furthermore the defect was latent, and that an inspection would not have revealed the defect. Other defenses were set up, but they are in no way sustained by the testimony and will not be noticed. There is some contrariety of opinion as to the duty of a con-

cern engaged as defendant was to inspect cars turned over to it by another company; but while it is true that it is not a railroad in the strict sense, and has no shops or place or possibly means to repair, and has no property in the cars, we think the trial judge properly applied the doctrine of *Woods v. Northern Pac. R. Co.*, 36 Wash. 658, 79 Pac. 309. Appellant was using the car as an incident to its business, which in its nature involves a certain degree of hazard to life and limb, and some duty, to be measured by the circumstances of the particular case, rested upon it. Although in the *Woods* case the danger was held to be apparent, the court said:

“The duty rested upon appellant to inspect foreign cars to see that no hidden dangers, such as want of repairs, involved its employees; . . .”

And:

“It is the duty of the receiving company to inspect and guard against defects of the foreign car from lack of repairs, and which may not be open and apparent to the employee.”

We do not want to be understood as holding that the duty of discovering hidden defects was upon appellant, for it was not; but only that the law is that it was bound to take notice of such defects as were patent or might be discoverable by the exercise of such reasonable diligence as the circumstances of the case demanded. For the high degree of care put upon a railway company, having its own cars and shops and men employed to do that service, should not be put on to one who merely loads or unloads the cars of another; and especially so when the employee is in a position to, and is presumably competent to, detect ordinary defects. But where the defect is latent, a want of care will not be imputed to the employee, and only to the master in so far as the jury may find that ordinary diligence on his part would have discovered it. He is not to be held to be an insurer.

“Judicial holdings unite upon the proposition that the master is not liable for an injury to his servant, caused by

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hidden defects or dangers in the machinery, appliances or premises furnished to the servant, when such defects or dangers were unknown to the master and were not discoverable by the exercise of that reasonable care and skill in inspecting them which has been already spoken of, and when there is nothing in external appearances to create a suspicion of their presence, . . .” 4 Thompson, Law of Negligence, § 3785.

Passing this point, we come to the main case: Has an omission of duty been shown. There had been no inspection, nor does it appear to have been the custom to inspect. While it is the duty of the master to inspect it is also the law that he will not be held liable if it is made to appear that a reasonable inspection would not have discovered the defect. In other words, unless the defect was patent “the master is not liable for an injury to his servant from the giving way of such a structure on which the servant is required to work, unless the master knew, or by the exercise of reasonable inspection might have known, of the defect therein; and this is especially true where the means and opportunity of inspection are equally open to the servant.” 4 Thompson, Law of Negligence, §§ 3952, 4396. A patent defect is one that is open or which might have been discovered upon casual examination. These rules were known to respondent, and he has attempted to show that the defect was patent. The broken staff showed that it had either been improperly welded, or had been broken after being welded. This is indicated by the fact that an area of about one-fourth of the area of the fracture, and at about the center thereof, was bright, while the remaining surface was rusted and discolored, showing that the union was not perfect. Some witnesses swear that there was also a bright surface about the edges. No one saw, so as to testify to the appearance of, the staff before the accident, so that respondent resorted to opinion evidence to sustain his case. The staff was made of black iron, and there is testimony showing that there was some rust and scurf about the weld. All of the witnesses

agree that it is what is called a rough weld; that is, not smoothed down as is done in fine work; that the only way to test a weld is to strike it over an anvil or twist it, as the expression goes; that a rough weld does not indicate weakness in the iron, or that it is a bad job, one witness stating that it would indicate that the workman was satisfied with his job and not undertaking to cover anything up. So that we take it that, unless there was something apparent other than the weld, appellant would not be liable. Respondent undertook to prove that there was a patent defect in the staff. His principal witness, who on the next day saw the part that was broken off and through whom respondent sought to sustain this theory, testified, after describing the appearance of the broken staff, as follows:

“Q. You could see that it had been welded however? A. Yes, sir. Q. It shows it had been welded? A. Yes, sir. Q. Even above where it was broken it shows it was broken? A. Yes.”

He then testified as follows:

“Q. What did you say with reference to that having been an old break there? A. Well, it might have been an old break. I can't just tell about that, but it looked like two different breaks. Q. Well, the morning that you looked at it I understood your testimony was that this darker portion was bright? A. Yes, sir. Q. This other side was an earlier break I understood it. Isn't that a fact? A. That is the way it looked to me that morning. Q. Conceding that to be true, what strength would that portion have if this side had not adhered and on the other side was cracked. That is what I want to know. Mr. Hulbert: Let me ask you a question. Q. (By Mr. Hulbert). The only information you got was from observation the next day? A. Yes, sir. Q. (By Mr. Hulbert.) Now are you able to tell the court and jury now from that observation whether or not there had been any former crack or break or whether or not it was merely a defective weld in that it did not adhere? A. Well, I would call it a defective weld. That is my opinion on it. That break looked to me then and does yet, as though part of that was broke before. Q. (By the Court). You mean before it was

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welded? A. After it was welded, it looks as though that break there was broke just within this last break? Q. (By the Court). Now, let us understand that. You claim there was one part that never did weld; one part that was broken, and one part that was left. In other words three different conditions of metal? A. Yes, sir. Q. (By Mr. Pemberton). This broken part was the last break; a new break? A. Yes, sir."

The witness was thereafter recalled and, omitting the colloquies of counsel, the following question was asked:

"You testified concerning that brakestaff there as to its not being welded on one side and being cracked on the other and a person near the brakestaff looking for—inspecting it, would it be discernible, easy of detection?"

After some objections and argument, the question was restated:

"You have testified as to the condition and appearance of this brakestaff, exhibit A. From that would it be discernible—any one inspecting the brakestaff?"

The court said:

"I will permit him to testify as an expert. I think if he can tell as an expert from this particular exhibit whether or not he can determine from that whether or not there was an apparent defect, why he can say so and if there was not he can say so. I believe he could be permitted to do that, but it should be confined to the examination of this particular piece of iron."

Whereupon the witness answered:

"Well, it looks to me as though it could have been told. Broke on one side and not welded on the other."

The witness had already testified:

"Q. And the appearance of a weld depends upon the way it is finished off, does it not? A. Yes, sir. Q. Some men will hammer a weld together and leave it rough and a little larger than the rest of the piece and others will pound it down or file it off and finish it and make it smooth? A. Yes, sir. Q. So that, outside of the appearance of the weld, whether it is

good or bad, depends upon the workmanship of the blacksmith in finishing it off? A. Yes, sir. Q. Then I understand you to say, Mr. Isaacson, that it would be impossible to tell what the condition of the weld was from a mere inspection or looking from the outside without taking a hammer or something of that kind for the purpose of testing it? A. It is pretty hard to tell on the inside, how it was."

And thereafter:

"Q. Mr. Isaacson, you never saw this brakestaff before the accident did you? A. No, sir. Q. You never saw the other end of the brakestaff, did you? A. No, sir. Q. The only thing that you ever saw was this piece? A. Yes, sir. Q. You don't know just how it did fit on the other piece, do you? A. No, sir. Q. You cannot tell, and never did know, just how smooth it fit on the other piece, do you? A. No, sir. Q. You don't know whether there was any crack visible there or not? A. No, sir. Q. You don't know and cannot state whether or not there was a break there that could have been seen, do you? A. No, sir; not from that piece. Not only from that piece. Q. You merely guess from that piece that one side was cracked? A. Yes, sir. Q. And you say that that was rusty? A. Yes, sir. Q. Now, you don't know what the condition was or the appearance was as the time of the accident? A. No, sir. Q. You don't know—in other words, you don't know what the appearance of the brakestaff was at that time? A. No, sir. Q. You don't know whether any one there looking up and down that brakestaff could have seen that crack or not, do you? A. No, sir. Q. At that time? A. No, sir. Q. If it was cracked, you don't know when or how it was ever cracked? A. No, sir. . . . Q. The mere fact that a rod is welded and you can see that it is welded wouldn't make you feel that it was weakened on that account, would it? A. No, sir. Q. Very frequently if a weld of that kind is properly adhered and properly done, the brakestaff would be just as likely to break somewhere else as to break there, wouldn't it? A. Yes, sir. Q. So that if you would see a weld, an ordinary weld on a brakestaff, you would not feel that it should be condemned because of that fact, would you? A. No, no not just because it was welded. Q. If the weld was of ordinary appearance—if you thought about it at all, you would

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think that it might break in some other place just as quick as in that weld? A. Well, it all depends on how it looked. Q. Well I say of the ordinary appearance? A. Yes. Q. So far as you know, this weld was of an ordinary appearance; as far as you know? A. Yes."

And on reexamination:

"Q. Does this look like an ordinary weld? A. Yes. Q. It looks like an ordinary weld? A. Yes. Q. What do you mean by ordinary? A. Well, from the outside. Most all welds unless they finish them off closely, they have a scurf on there where they draw them down to weld. Q. You testified that this would have been readily detected; this weld in the condition that you found this in then? A. Well, the way it looked to me from that break, you could tell the break—that is what I testified to, that the break would usually be better than the weld would. If the weld was perfect there—as I stated, it is pretty hard to tell how they are on the inside. But this break in there on the outside, I would imagine a person could see it. Q. The old break, you are talking about? A. Yes, sir."

And on recross-examination:

"Q. That is just exactly what you meant when you said you thought that it might be seen? A. Yes, sir. Q. Not on account of the weld? A. Yes, sir, the break. Q. But on account of the crack that you thought might have existed in the brakestaff? A. Yes, sir. Q. And all of your testimony was upon the assumption that there was a crack there and that the crack was open so that it could be seen? A. Yes."

And in answer to a question propounded by the court:

"I want to know whether or not you say that there was a crack or was not a crack? A. From the way it looked to me when I first seen it, I would say that there was a crack there."

This is the strength of respondent's case, although another witness gave somewhat similar testimony. Upon a motion for a directed verdict, the trial judge was of opinion that:

"If that witness told the truth with reference to how much was still attached to that brake, the two pieces, it would have

been a very easy matter to have found out that that brake was about in two. Now should the defendant have taken hold of it or inspected it in some way except by passing along and looking at it. Now, your argument proceeds upon the theory that a man going along there could not have seen that crack. Is that enough? Is that what an ordinary man would do? Isn't it a question of fact for the jury to say from what was the general method of how men do in those matters of human affairs?"

But we think the court erred in assuming that the rather doubtful opinion of the witness was sufficient evidence that there was a crack in the brakestaff, or that, if so, it could have been noticed. He well says: "Is that enough" etc.; but there is no evidence to show what was a general method, or whether there was any method other than observation, or whether any other method would have been practical. The verdict of the jury must find some basis in the evidence. They are not permitted to speculate or say what might have been; nor is a witness to be allowed to speculate or theorize, and from his own hypothesis, express an opinion of what might have been, and pass it as original evidence. Neither the witnesses nor the jury are permitted to guess as to whether the defect was hidden or not, or to presume negligence from the happening of the accident.

"Moreover, it is not enough to prove the existence of a defect at the very moment of the accident, but it must also appear that the master had an opportunity of previous knowledge, or that the facts were such that he might, by the exercise of the proper care and diligence, have known of the defect. Hence, although a railroad company has no right to assume that cars received from another company are in a safe condition, but is under the duty of inspecting them before requiring its servants to handle them,—it is not liable for injuries to a brakeman from the breaking of a brakestaff upon such car through an old crack, which could only have been detected by taking the staff off the car and striking it with a hammer, where there was nothing in the appearance of the car indicating that it needed repairs; nor for injuries to a brakeman by the giving way of a brake-rod in which

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there was an old crack, which could be discovered only by taking out and lifting up the brake-rod, and which is not apparent upon any inspection made in accordance with the universal custom of well-conducted railroads, in the absence of anything that would suggest, to the mind of a reasonably prudent person, a necessity for so lifting or taking out the brake-rod." 4 Thompson, Law of Negligence, § 4398.

In *Read v. New York etc. R. Co.*, 20 R. I. 209, 37 Atl. 947, it is said:

"According to the testimony, the defect in the brake-rod, by the breaking of which the plaintiff was injured, consisted of a flaw due to the imperfect welding of the two pieces which composed the rod. The evidence on the part of the defendant tends to show that the flaw was not discoverable, owing to rust on the rod, by the usual methods of inspection. There is no evidence on the part of the plaintiff to rebut this, for, *though the plaintiff testifies that the defect would have been discernible by the eye if it had been daylight, it is evident that this statement is merely his inference from the fact that the brake-rod was so easily twisted off in his attempt to set the brake.* If the defect was not discoverable by the customary modes of inspection, or, in other words, was a latent defect, the defendants were not guilty of negligence, and consequently the verdict was against the evidence on this point." (The italics are ours.)

See, also, *Louisville & N. R. Co. v. Campbell*, 97 Ala. 147, 12 South. 574; *Sack v. Dolese*, 137 Ill. 129, 27 N. E. 62; *Grant v. Pennsylvania etc. R. Co.*, 133 N. Y. 657, 31 N. E. 220.

The sum of the testimony was that an examination would have revealed the fact that there had been a weld, for the witness said: "Q. You don't know whether there was any crack visible or not? A. No, sir," and that he did not know the appearance of the staff at the time of the accident. All he says is that there might have been a visible crack, and if so, it might have been seen upon inspection; but no witness undertook to say that there was any custom or manner or method of inspection prevailing among those who take cars to load or unload. So we must assume that a mere looking

the equipment over would have been sufficient. Otherwise, we would have to hold, as an arbitrary proposition of law, that every shipper who loads or unloads the cars of a railway on his own spurs or tracks is bound to the same rigid duty of inspection that the law puts upon the railroad itself; or, to put it in other words, to employ men for that service alone. A witness was offered to show custom, but proved himself without knowledge, and his examination was not pursued further.

The jury had no standard with which to weigh the evidence. Their verdict was necessarily speculative, for there is no basis for it other than the inference of the witness, drawn from a hypothesis which he admits is based upon pure conjecture. We cannot assume, in the absence of direct evidence, that the jury can say: "What was the general method, of how men do in such matters of human affairs?" It may be that the general method would put the burden of inspecting cars, put to only a temporary use, on the train crew; or it may be, as in the absence of testimony we have assumed it to be, on the master to the extent of discovering obvious defects. It may be that respondent has a lawful demand, and that upon a retrial, he may prove it by competent evidence.

This case is accordingly reversed and remanded for a new trial.

ELLIS and MORRIS, JJ., concur.

CROW, J. (dissenting).—Respondent, in the regular course of his employment, attempted to use an appliance provided by his master, and without fault or negligence on his part, was injured by reason of the appliance breaking. It should not be assumed that the only necessary or feasible method of inspection would be to look at the brake-rod for obvious defects, ignoring nonobvious ones that might also exist. The brake-rod could have been further tested and inspected by some practical method which would have subjected it to as much resistance and strain as it underwent when used by re-

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spondent. If the physical force which respondent applied when attempting to set the brake was sufficient to reveal the defect and cause the accident, it would seem that a like quantity of force, previously applied upon inspection, would have caused a timely discovery of the defect. I think the questions whether the defect could have been discovered by a proper inspection, whether such an inspection had been made, and whether respondent assumed the risk, were for the jury, and were properly submitted for their consideration.

I therefore dissent.

DUNBAR, C. J., concurs with CROW, J.

[No. 9123. Department Two. August 11, 1911.]

OLYMPIA MINING AND MILLING COMPANY, *Appellant*, v.

ABNER G. KERNS, *Respondent*.¹

COURTS—JURISDICTION—SUBJECT-MATTER — LANDS — COMITY. It is discretionary for the courts of this state to refuse, on the doctrine of comity, to assume jurisdiction of an action between nonresidents, upon a contract made and to be performed in the state of their residence, where the action involves only the title to real property in such state, especially where a similar action had been commenced and was voluntarily dismissed in such state, and there would be no way of enforcing a judgment in this state, no damages or alternative judgment being asked.

SAME—ACTION BY FOREIGN CORPORATION. A foreign corporation would have no more right than any other party to maintain such an action by reason of its having filed articles in this state and complied with our laws.

Appeal from a judgment of the superior court for Spokane county, Canfield, J., entered April 21, 1910, upon findings in favor of the defendant, after a trial on the merits before the court without a jury, in an action for specific performance. Affirmed.

¹Reported in 117 Pac. 260.

E. C. Macdonald, for appellant.

Samuel R. Stern, for respondent.

CHADWICK, J.—In the year 1901, Clarence Cunningham entered into an agreement with the defendant, looking to the promotion and development of certain mining claims in Shoshone county, state of Idaho. Pursuant to the agreement, as it is contended by Cunningham, but after the contract had been abandoned by him, as the defendant insists, and after foreclosure proceedings, defendant acquired title to the property covered by the contract, and thereafter did assessment work and patented the claims. A part of the original agreement was to the effect that Cunningham would organize a corporation and take over the property, defendant to receive, in addition to a certain stipulated purchase price for a part interest in the property, a block of the company's stock. A corporation, the Olympia Mining Company, was formed March 30, 1903, under the laws of the state of Washington, and on May 29, 1905, an action was begun by it in the state of Idaho, asking that it be declared to be the equitable owner of the property, that defendant be compelled to convey, and for general relief. From a judgment in favor of the company, an appeal was prosecuted.

The case was decided June 18, 1907, and was generally in favor of the company; but it was held that the original contract contemplated the organization of a corporation in the state of Idaho, and that defendant had a right to participate in the organization thereof. Accordingly the case was sent back to the lower court, where it was again called for trial upon the same pleadings, no amendments being offered thereto or substitution of parties had. Whereupon the trial court dismissed the action, and entered a judgment for costs. The company again appealed, and the judgment of dismissal was sustained, the supreme court again holding that the action could not be maintained by the foreign corporation. We take it that a more detailed statement of the relations of the

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parties up to this time would be of no interest. If so, reference may be had to *Olympia Min. Co. v. Kerns*, 13 Idaho 514, 91 Pac. 92; *Id.*, 15 Idaho 371, 97 Pac. 1031.

After the second appeal, Mr. Cunningham caused a corporation to be formed under the laws of the state of Idaho. Articles were prepared and filed, after defendant had been given notice of the time and place of organization and of the proposed articles. Thereafter the new corporation, the plaintiff in this action, began suit in Shoshone county, Idaho, against defendant, raising substantially the same issues as in the former case. Defendant interposed a demurrer which, by consent of the plaintiff, was sustained. An amended complaint was filed, to which a demurrer was interposed; whereupon plaintiff took a voluntary dismissal. The order of dismissal was entered July 13, 1909, in the district court for Shoshone county, Idaho. Plaintiff, the Idaho corporation, having complied with the laws of the state of Washington with reference to foreign corporations, thereafter on August 23, 1909, began this action, which is substantially and to all intents the same action which had been waged by the Washington corporation in the Idaho courts, and which plaintiff had voluntarily dismissed after issue of law had been joined. Service was obtained upon defendant at a time when he was temporarily in the city of Spokane. Defendant demurred, setting up, first, that the court was without jurisdiction of the parties or the subject-matter of the action, including in the same demurrer all of the statutory grounds. This demurrer being overruled, he answered to the merits. As a separate defense, he pleaded a lack of jurisdiction. After hearing the full merits of the case, the trial judge entered conclusions as follows:

"(1) The superior court in and for the state of Washington for the county of Spokane acquired jurisdiction over the defendant.

"(2) Such jurisdiction can be exercised by the superior court in and for the county of Spokane, state of Washing-

ton, as a matter of comity, and it is within the discretion of said court as to whether or not it will hear and determine the issues involved herein.

“(3) The superior court of the state of Washington in and for the county of Spokane should not entertain jurisdiction of this case and the parties should be left to adjudicate their rights in the state of Idaho, where the contract was made, and was to have been performed and where the property involved is situated, and where plaintiff first invoked the jurisdiction of the courts in its aid.

“(4) The action may be dismissed and judgment may be entered accordingly.”

Plaintiff has appealed.

The first point relied upon by appellant is that, personal service being had of the defendant within our state, the lower court was clothed with full jurisdiction and the right to pass finally upon the merits of the controversy, for the reason that respondent did not limit his appearance but included therein grounds which invoked the general jurisdiction of the court, and that his answer was in the nature of a cross-complaint demanding affirmative relief. As we view the case, it is not necessary to enter into a discussion of the question of jurisdiction. It is enough that we agree with the trial judge in his finding that personal jurisdiction was acquired over the defendant, and that he might, so far as that question is concerned, have pronounced judgment in the case. But under the facts disclosed by the record, the subject-matter of the action being situate in, and the parties being domiciled or resident within, the state of Idaho, we take it that it will require no argument to sustain the proposition that the jurisdiction of our courts cannot be invoked as a matter of right, but rests in the doctrine of comity. That a court may refuse to entertain jurisdiction where the parties are non-residents and the cause of action originated and is to be performed beyond the limits of the state, is well established. *Morris v. Missouri Pac. R. Co.*, 78 Tex. 17, 14 S. W. 228, 22 Am. St. 17, 9 L. R. A. 349; *Great Western Co. v. Miller*,

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19 Mich. 305; *National Tel. Mfg. Co. v. Du Bois*, 165 Mass. 117, 42 N. E. 510, 52 Am. St. 503, 30 L. R. A. 628.

Nor is this discretion entirely unqualified in a case like this, for the judgment must be personal in its character, and will be inoperative so far as the subject-matter is concerned. A decree giving appellant all he asks would be no more than a roving commission to again invoke the courts of Idaho, where a decree operating on the property must eventually be taken.

"The plaintiffs necessarily will be referred to the courts of Missouri to compel the defendant to respect their rights, in case compulsion is necessary. The most that we can do, if they have the right they claim, is to reduce it to *res judicata*. Whether they have that right is a question of Missouri law touching the internal affairs of a Missouri corporation. The objection to our proceeding with the case was taken at the outset, and we are of opinion that it must prevail. We assume, for the purposes of decision, that we have jurisdiction in such a sense that, if we proceeded to a decree upon the merits, it would be binding in Missouri. But it seems to us clear that, as among the states of this Union, the plaintiffs ought to resort in the first instance to that court which alone can declare the law of the case with authority, and can compel obedience to it by force. It would be a misuse of our powers to attempt to control the action of those courts in a case like this, by an adjudication which would depend upon them for enforcement, and which they might say had mistaken the Missouri law; . . ." *Kimball v. St. Louis etc. R. Co.*, 157 Mass. 7, 31 N. E. 697, 34 Am. St. 250.

See, also, *Fall v. Eastin*, 215 U. S. 1; *Olmsted v. Olmsted*, 216 U. S. 386.

This case does not rest upon the right to sue or be sued in any court, but rather upon the completeness and justness of the judgment which might be rendered. It has been held that actions for damages *ex delicto* and *ex contractu* for injuries to real property, no question of title appearing, and under certain conditions suits for specific performance, are transitory actions; the latter upon the theory that the court

could enter an alternative judgment for money, or otherwise coerce performance. But it is settled, without conflict of authority, that the courts of one state or country have no authority to divest title to the real estate of an involuntary defendant, situated in a foreign state, or to entertain an action for trespass or ejectment, it being most aptly said in the books that such actions "touch the title" and are purely local in character.

To come within the law, appellant has waged this appeal upon the theory that this is a transitory action, and cites many cases to sustain its assertion that the court "is bound to take jurisdiction in a transitory action between nonresidents, where the defendant submits himself to the jurisdiction of the court by general appearance." The trial judge was of opinion that this is a transitory action (for specific performance), and entered a decree upon the theory that it was not a proper case for the exercise of his jurisdiction, reference being had to the doctrine of comity. But whether it be held to be local or transitory, and whatever may have been the original right of the parties under their contract, intervening circumstances have so altered their relations to the subject-matter of the controversy that a court can no longer make a decree by reference to the contract alone, but must go beyond it and inquire into equities that cannot be held to be within the contemplation of the parties at the time the contract was made; all of which may be dependent on the application of some statute or rule of law local to the state of Idaho. Such circumstances rob a case, otherwise transitory, of such character, and impel courts to send the litigants to that forum where a final and an effective judgment may be rendered.

The cases relied on by appellant, so far as they touch real property, turn on some exception to the general rule; as, for instance, in *Cofrode v. Gartner*, 79 Mich. 332, 44 N. W. 623, 7 L. R. A. 511, although the property was situate in a foreign state, the court held, and properly, that a contract

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relating thereto would be enforced at the place of its performance. The same principle is involved in the case of *Hunter v. Wenatchee Land Co.*, 36 Wash. 541, 79 Pac. 40. In *State Bank of Eldorado v. Maxson*, 123 Mich. 250, 82 N. W. 31, 81 Am. St. 196, property was attached, and jurisdiction was made to rest upon the principle announced in *Sleight v. Swanson*, 127 Mich. 436, 86 N. W. 1010, that being a garnishment proceeding. Of like character is the case of *Dittenhoefer v. Coeur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660, where the court recognized the rule that, unless jurisdiction attached to some *res*, a personal action could not be sustained against a nonappearing defendant. All other cases cited by appellant are either for breach of a personal contract or for the recovery of damages, and clearly within the definition of transitory actions.

Out of the wilderness of authority, this rule comes: That a court of equity, having jurisdiction of the parties, may assume to dispense the subject-matter, although it be located in another state or country, if it can grant effective relief by a decree acting solely upon the person whose title or interest in the land is to be affected. In such cases there must be a proper case for equitable interference as well as the right to grant a decree personal in its character. The courts act upon the contracts of parties, but do not try titles where the essence of the action is title or right of possession. While not always clearly indicated, the fundamental principle that the title or right of possession in real property should be tried only in the place where the property is situated, runs through all of the cases. It is in this that this case is to be distinguished from that line of cases compelling specific performance, etc. Nothing more is involved in this case than the title and possession of the mining claims located in the state of Idaho, to which each party sets up a claim and to which the relations of the parties, or at least one of them, have been changed by force of local proceedings occurring in that state since the execution of the con-

tract upon which appellant relies. No damages are alleged or demanded. No alternative judgment is asked. Our decree could not be drawn without determining title and right of possession. This test, in our judgment, makes the action more properly subject to the *lex rei situs*, and sustains the judgment of the lower court.

Appellant further contends that, having filed articles of incorporation in this state and otherwise complied with our laws, to deny a recovery is to deprive it of the right of equal protection of the laws. Granting that foreign corporations are entitled to the same rights as our own citizens, it does not follow that they have greater rights. The rule herein announced is general and applies to all alike.

We find no equity or reason in law for sustaining appellant's plea, and the judgment is affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9211. Department Two. August 11, 1911.]

REBECCA A. PRINCE, *Respondent*, v. CHARLES A. PRINCE,
Appellant.¹

WILLS—CONTRACTS TO DEVISE—MUTUAL WILLS—REVOCATION—ESTOPPEL TO REPUDIATE—HUSBAND AND WIFE—COMMUNITY PROPERTY—ELECTION TO TAKE UNDER WILL—EVIDENCE—SUFFICIENCY. The intention of the parties to make provision for their children, with all the aspects of a contract which is irrevocable by the survivor after the death of the other, is clearly shown, and the widow makes an election which she cannot subsequently repudiate by claiming a community interest in lands devised by mutual wills to their children, where it appears that husband and wife, following a policy to advance \$1,000 to each of their children, there being three minors still unprovided for, executed mutual wills devising to two minor sons specified tracts of community property, each charged with the payment of \$500 to a minor daughter, that wills instead of deeds were made on the advice of an attorney because of the minority of the sons and their supposed inability to contract for

¹Reported in 117 Pac. 255.

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the charges thereon, and that, at the same time, a deed of property was made to another child, and a writing signed by the heirs, releasing all claims to the estate in consideration of the advances; and where, on the death of the husband, the widow offered his will for probate and accepted the benefits of devises to her of portions of the husband's separate and community lands, and bequests of personal property, which she converted to her own use.

EVIDENCE—JUDICIAL NOTICE. The courts will take judicial notice of the practice of spouses in this state to make mutual wills of community property.

APPEAL—PRESERVATION OF GROUNDS — EXCEPTIONS — SUFFICIENCY. A general exception to a specific finding is sufficient without any specification of the reasons therefor.

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 11, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for partition. Reversed.

B. H. Rhodes and Troy & Sturdevant, for appellant.

G. C. Israel, for respondent.

CHADWICK, J.—Jonathan D. Prince and Rebecca Prince were married in the year 1872, and to them seven children were born. At the time of his marriage, the husband had eighty acres of land which he had bought of his brother William, or it may be that it had been given to him; at any rate, he never paid, nor does the record show that demand was ever made upon him for the payment of, the purchase price. Upon this eighty acres they lived together until April, 1906, when Jonathan D. Prince died. The Princes had been thrifty in a way, and had accumulated other pieces and parcels of land besides accumulating, as the court found, something like \$5,000 in improvements or betterments to the home place. When Mr. Prince died, the place was apparently stocked with all kinds of farm equipment and machinery necessary to carry on the farm, besides hogs, cattle, horses, etc. The record shows that the father and mother had, from time to

time and as the children became of age, made allowance out of their property by deed or gift, to the extent of about \$1,000 in value to each child.

On or about January 8, 1906, Jonathan D. Prince, who was then sick of the malady to which he succumbed, was solicited by the husband of one of the daughters, who up to that time had received no share or dowry, to make a deed to his daughter of what would be her share of the property. This he was willing to do, and we take it that respondent was of like will, for she is not, so far as the record shows, attacking the deed to the daughter in which she joined as grantor with her husband. This left three of the children, Charles Prince, Ralph Prince, and Lelah Prince, all minors, unprovided for. An attorney had been procured at Centralia to draw the deed aforementioned. At the same time, whether upon his advice is not entirely certain, but probably so, Mr. and Mrs. Prince executed wills, alike in form and terms, whereby each gave to Charles and Ralph two several tracts of land, each tract being charged, however, with the payment of \$500 to be paid by the devisee to his sister Lelah. After some specific devises and mention of the other children, all of the property remaining, including the home place, was devised to the respondent.

It is the theory and contention of the appellant that the wills were drawn because the two boys, Charles and Ralph, being minors, could not accept a conveyance coupled with a promise to pay the charge in favor of their sister. In other words, their right to contract was questioned. Respondent contends that she at no time intended to part with any of her community interest in the property, and although the question of wills and the interests of the children had been the subject of some strife and even controversy between her husband and herself, she finally signed the will "just to keep peace in the family," intending at the time to "break it." At this point it may be said that two witnesses who appear to be disinterested testify that, the day after the deed was

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executed and the wills were drawn, respondent expressed herself as well satisfied and pleased that the interests of the children theretofore unprovided for had been taken care of.

Upon the death of her husband, respondent offered the will for probate, and it being a nonintervention will, only such proceedings were had as were deemed necessary to pass it beyond the claim of creditors and such liability as might be owing the state under the inheritance tax statutes. Respondent took the rents from all of the land up to the time this action was begun, excepting that part which was willed to Charles. This tract was either farmed by Charles or he collected the rent after becoming of age. The lessee paid the portion due on Ralph's estate to the respondent, she demanding it because, as he says, "Ralph was not of age." Respondent sold and disposed of all of the personal property and used the proceeds thereof for her own benefit, and has also incumbered all of the lands of the estate, and has converted the proceeds thereof. At any rate, no accounting of her trust was ever filed in the probate court, nor is it tendered in this action. She insists, however, that she has replaced the personal property and stock with property of like character and of equal value. There was some money left at the time the will was probated. This she says was used to meet living expenses. In November or December, 1906, respondent moved off the ranch, and since that time the children, Charles, Ralph, and Lelah, have received no support from her. A material circumstance attending the execution of the deed and wills was the execution of a writing which, although referred to in the testimony, is not brought to this court. It was signed by respondent and the heirs, and in it this language occurs:

"The undersigned hereof, being the surviving parents, have all of the estate then existing free from any claim on our part by reason of the consideration aforesaid."

One of the children in speaking of this instrument says:

"Q. Do you remember that paper? A. Yes. Q. Do you

know how you came to sign it? A. Yes. Q. How was it? A. Well, to fix up the estate; to show that I got my share of the estate there. Q. At whose request was that signed up, do you know? A. Why, father and mother;”

while respondent says:

“Q. Do you remember that? A. Yes. Q. What did you understand from that? A. I understood I should have my share, my half of all of the property. Q. In case of the death of your husband? A. Yes;”

which shows her knowledge of the writing at that time.

In July, 1908, respondent brought this action against her children Ralph and Charles, praying for a partition, upon the theory that her husband had no right to devise to another, even to the children of the parties, any specific interest in the community property, and that she was not put to an election to take under the will for that reason. The defense is that she has elected, and should be bound by the terms of her husband's will. The court found that the original home place was the separate property of Jonathan D. Prince, subject to certain equitable charges in favor of respondent, and in all respects that the prayer of respondent's petition should be sustained. A decree was entered accordingly.

That one spouse cannot devise the property of another by will is a general rule and will require no elucidation. Joint or mutual wills, made upon proper understanding and executed pursuant to a contract or policy designed to settle the probable interests of the testators and looking to the just provision of those having a claim upon their bounty, partake of the nature of a contract and may be specifically enforced (*Edson v. Parsons*, 85 Hun 263, 32 N. Y. Supp. 1036), and in such cases are said to be almost irrevocable without the consent of all the parties. Remsen, Preparation and Contest of Wills, § 6.

“There is no rule of law or policy which stands in the way of parties agreeing between themselves to execute mutual and reciprocal wills, which, though remaining revocable upon

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notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations, of which equity will assume the enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor; but, to invoke the intervention of equity, it is not sufficient that there are wills simultaneously made, and similar in their cross provisions, but the existence of a clear and definite contract must be shown, either by proof of an express agreement, or by unequivocal circumstances." 20 Dec. Dig., p. 937.

In Rood on Wills, § 70, it is said, under the title, "Joint, Double, Mutual, and Simultaneous Wills:"

"Contracts may be joint; for it may be agreed that a joint delivery shall be made by one for all. Therefore, a joint will is an instrument unknown to the law. Yet there is no reason why several persons may not execute the same paper as expressing the disposition of their property, which they desire to have made after their deaths, whether the property thus disposed of be owned by them severally or jointly; and such wills should be and generally have been sustained—not as the joint will of all, but as the several will of each;"

In principle we cannot distinguish between a single instrument signed by both parties to the contract, and separate instruments alike in kind and character, and intended to effectuate the same purpose. *In re Cawley's Estate*, 136 Pa. 628, 20 Atl. 567, 10 L. R. A. 93. Continuing, the author last cited says:

"But if to the making of the will be added the death of the maker without revoking it, a sufficient valuable consideration is found to bind the other party and his estate," Rood, Wills, § 72.

If one party to a contract to make mutual or reciprocal wills could not, after the death of the other party, revoke his will, it would seem to follow that he could not elect to take under the statutes of descent, he being defined as an heir by the statute; for the legal effect in each case would be the same—to compel the intestacy of the one first deceased. In

discussing the right to revoke a mutual or reciprocal will, Mr. Underhill says:

“If two testators who have united in the execution of a mutual will have devised their property to each other so that the devises form a mutual consideration, neither, after the death of the other and the probate of the will as to *his property*, is at liberty, after accepting the benefit conferred, to repudiate the contract to the injury of the heirs or next of kin of the testator who predeceased him. The mutual will was made upon condition that the whole shall be but one transaction. If the will is not revoked during the joint lives of the testators, he who dies first has a right to rely upon the promise of the survivor. He has fulfilled *his part* of the agreement, and it is not just to his representatives to permit a revocation when he has been prevented from revoking his will by a reliance upon the other’s promise. It is too late for the survivor, after receiving the benefit, to change his mind, because the first will is then irrevocable. It would have been differently framed, or perhaps not made at all, if it had not been for his inducement.” Underhill, *Law of Wills*, p. 20.

“It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the court afterwards permit the other to break the contract? Certainly not.” Lord Camden, *Dufour v. Pereira*, 1 Dick. 419, 21 Eng. Rep. 332.

It is not necessary for us to go to the extent of holding, as a general proposition, that respondent might not have revoked her will, thus implying a revocation of her husband’s will, either before his death or thereafter. But mutual wills reciprocal in their nature being sustained in law, the only question open, it seems to us, is whether the proof of the original policy to care for all the children alike, and the agreement to make the wills, is clearly and definitely established. The right of election or rather repudiation, in such cases must be measured by the intent of the parties at the time of making the wills, as well as by their subsequent conduct. That the intent of the parties was to provide for the

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three minor children, in the same manner and to the same extent as those who had come to their majority, is clearly evidenced. The first concern of the deceased seems to have been to provide for the minor children, the two sons and daughter, out of the community property. To accomplish this he called an attorney who, because of the minority of the children, advised the making of the wills instead of deeds, and but for this advice of counsel the deeds would have been executed, and this controversy in all probability been avoided.

We have not overlooked the assertion of respondent that she made the will just to keep peace in the family. But she offers no evidence even tending to show that there was any coercion or undue influence. On the contrary, her expressions that she was glad it had been settled, and her repeated declarations in her testimony that she wants the children to have their share, indicate a changed intent rather than a coerced will. Indeed, no reason for coercion appears. The deceased owned the home place as his own, and although the fact that it was his separate property developed on the trial, we must presume that he knew the status of his own property and might, but for the execution of a like will on the part of his wife, have provided for his children out of his separate estate, or out of his share of the community property, even to the whole of it. The fact that the parties gave specific tracts to the children, reserving the home and all personal property for the survivor, in itself shows a mutual and parental regard for the children and a concern for the survivor utterly inconsistent with any intent other than a desire to leave the estate upon the death of one of the spouses as defined in the wills. The circumstances set out in the preliminary part of this opinion—the probate of the will, the conversion and use of the personal property, the conduct of respondent with reference to the use of the devised lands and of the rent therefor—so clearly show her understanding in the matter that to allow her present plea would not only work injustice and inequity, but would put a premium upon

deception between those who, for a sufficient consideration or because of their community interest, execute mutual or reciprocal wills; a condition we are not prepared to sanction, for in this state our community property statutes not only invite, but almost compel, such dispositions of property, and the execution of such instruments has come to be so common that we feel bound to take judicial notice of the custom, and to sustain them if possible.

In *Edson v. Parsons*, 155 N. Y. 555, 566, 50 N. E. 265, it is said:

"I fully concede that there is no reason in law, nor any public policy, which stands in the way of parties agreeing between themselves to execute mutual and reciprocal wills; which, though remaining revocable upon notice being given by either of an intention to revoke, become, upon the death of one, fixed obligations; of which equity will assume the enforcement, if attempted to be impaired by subsequent testamentary provisions on the part of the survivor. The proposition is one which may be regarded as having been accepted generally. (1 Jarman on Wills, * 27; 2 Story's Eq. Jur., § 785; Schouler on Wills, § 454; Lord Walpole's Case, 3 Ves. Jr. 402.) A court of equity would, in such an event, proceed upon the ground that the survivor was bound, not merely in honor, but by his agreement and by the acceptance of the benefit, which that agreement procured for him. In such a case, obviously no remedy at law would be adequate to the party, in whose interest, and for whose ultimate advantage, the testamentary agreement had been entered into. Therefore, equity would perform its high function of supplying the relief, which the rules of law are not sufficiently elastic to comprehend, and recognizing the obligation, which, in conscience and honor, rested upon the surviving party, would decree a specific performance of the testamentary agreement, by compelling those persons into whose possession the property affected may have come, to account for and deliver it over to the complainant, for being impressed with a trust in his favor."

This is quoted in *Baker v. Syfritt*, 147 Iowa 49, 125 N. W. 998, where the court said:

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"Coming a step nearer to the case in hand we see no good reason why husband and wife may not agree to unite their separate estates in the creation of a trust for the benefit of a third person, who shall come into the legal title and right of possession upon the death of the survivor. If to that end they execute a joint instrument, clearly expressing their purpose, then, whether it be called a contract, compact, will, or conveyance, we think it should be treated as a relinquishment of dower right, or, at worst, when one maker has died without attempting to revoke it, the other should be held estopped to set up any right which tends in whole or in part to the defeat of the common purpose. A contract is none the less a contract because it contains provisions which are testamentary in character, nor is a will any less a will, if properly executed, because it embodies contractual features. *Carmichael v. Carmichael*, 72 Mich. 76, 40 N. W. 173, 1 L. R. A. 596, 16 Am. St. Rep. 528; *Schneringer v. Schneringer*, 81 Neb. 661, 116 N. W. 491."

In *Deseumeur v. Rondel*, 76 N. J. Eq. 394, 74 Atl. 703, the joint will of a husband and wife was under consideration, and the court in discussing its effect said:

"It may be that during the lifetime of both Alexander and Elizabeth Bisson either could have rescinded this agreement—call it a will, or call it a contract, or an instrument of proof tending to prove a contract. But I am clearly of opinion that whatever name should be properly used to characterize this paper, it proves, or tends to prove, an agreement between the parties signing it to dispose of their property in a certain way which a court will enforce if made upon legal consideration, and if it be true and proven that at the time the paper was executed, and at the time of the death of Alexander he was possessed of personal property or real estate which was taken over and used by Elizabeth, his wife, by virtue of the probate of this paper as his will, the agreement thus evidenced has sufficient legal consideration to support it, and the rights under it will be enforced. If, for instance, Alexander was a man of means, and Elizabeth had the four lots which were in her name at the time of the making of the paper on the 20th of June, 1855, and they made this paper, which, as they said, was to make a final settlement respecting their properties, and he died first, and she took under the terms of

this paper which was probated as a will all of his personal property, and either used it (if it were held that under the terms of the probated will she was entitled to do so), or used it for life (if the narrower estate was held to be vested), I cannot believe it possible that any court would thereafter permit her, under these circumstances, to rescind or repudiate her part of the bargain."

Aside from what has gone before, we think respondent should be held to an election. We do not understand that the doctrine that one who accepts a benefit under a will must adopt the whole contents of the instrument or reject it in its entirety, is denied by counsel; but it is asserted, and the lower court must have so held, that the only benefit accepted was the conversion of the personal property which has been replaced in value if not in kind. This position is untenable. The provisions of this will are to be taken *cum onere*, and when once accepted must be held to control. Otherwise, there would be no stability to the law. The status of all demised property would be subject to the vacillation of the devisee, and the will would become the will of the living rather than of the dead. Neither a party nor the court should have the right to say that property can be accepted and put to personal use, and thereafter be replaced in value if it then seems more profitable to do so; for it is the act of acceptance, and not its consequences, which measures the election. We do not want to be understood as holding that a mere offering of a will for probate, and the acceptance of an appointment thereunder as executrix, would in itself defeat respondent's right of election; but this circumstance, when taken in connection with the admitted policy of the parents to make a clear provision for their children, and respondent's acts with reference to the children and the demised estate, may become, and in our judgment has become, of great weight, and must be taken to indicate a furtherance on her part of that policy which, as we have undertaken to show, took upon itself the aspects of a contract at the time the wills were executed.

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Respondent relies upon *In re Frey's Estate*, 52 Cal. 658; *Beard v. Knox*, 5 Cal. 252, 63 Am. Dec. 125, and *In re Smith's Estate*, 108 Cal. 115, 40 Pac. 1037. But, admitting that one member of a community cannot so devise the interest of the other spouse in the community property as to put her to an election—and these cases in their essence hold nothing more than this—yet they are not in point as we view the subject of our inquiry. There was nothing in any of these cases indicating that there was a full knowledge of all the facts concerning the property, or such a dealing with it as would estop the claimant. While here, there was no knowledge possessed by one spouse that was not possessed by the other; to which is to be added a mutual intent, evidenced by the wills and by the deed executed at the same time and by the subsequent conduct of the respondent, to carry out the provisions of their mutual writings. In this light, the case of *In re Smith's Estate* sustains our contention, for it is there said:

“Before the widow can be denied her right to elect upon distribution, it must be found that, with the knowledge of her rights by unequivocal acts evidencing her intent, she has so dealt with the property left her by the will that it would be inequitable to permit her to avoid these acts and disclaim her intent.”

Respondent has moved to dismiss this appeal, for the reason that appellant has entered his exceptions to each one of the findings of fact, saying that he excepts to the specified finding for the reason that the same is not supported by the evidence and is contrary to the law. It is said that these are general exceptions, and that they come within the rule of that line of cases beginning with *Hannegan v. Roth*, 12 Wash. 65, 40 Pac. 636, holding that a general exception is insufficient, and that the court will not, under such circumstances, inquire beyond the sufficiency of the findings of fact to sustain the decree. We do not agree with counsel. It has never been the purpose or the policy of the court to hold anything other than that exceptions should be in such form as

to indicate to the court the errors relied upon on appeal. An exception may not be taken if directed to all of the findings, but it may be in the same form and directed to a particular finding and meet the requirement of the rule. If the rule were not so, it would be incumbent upon us to define a form for exceptions, and clearly this would be beyond the proper function of this court.

For the reasons assigned in the foregoing opinion, the decree of the lower court is reversed, with instructions to deny the prayer of respondent's complaint, and to enter a decree in favor of the appellant; conditioned, however, that the said Charles A. Prince shall, within ninety days after the remittitur goes down, pay into the registry of the court the amount charged upon his inheritance for the use and benefit, and subject to the order of, Lelah A. Prince.

CROW, ELLIS, and MORRIS, JJ., concur.

[No. 9488. Department One. August 16, 1911.]

GRINNELL COMPANY, *Respondent*, v. HERBERT SIMPSON,
Appellant.¹

BROKERS—COMMISSIONS—PROCURING CAUSE. A broker who procured a purchaser for property ready, able, and willing to buy on the terms fixed, and notified the owner thereof, is entitled to commissions, where the sale was made shortly after, although the deal was closed by another broker, with whom the property was also listed, and through whom the purchaser took up negotiations with the owner.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered November 11, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action on contract. Affirmed.

¹Reported in 117 Pac. 391.

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Opinion Per Curiam.

Graves, Kizer & Graves, for appellant.*Cannon, Ferris, Swan & Lally*, for respondent.

PER CURIAM.—This is an action brought to recover a broker's commission. The respondent, the plaintiff below, alleged in its complaint that the appellant, being the owner of a certain tract of land situated near the city of Spokane, entered into a written agreement with the respondent, whereby he authorized the respondent to sell such tract on certain terms and conditions; that within a reasonable time thereafter, and under and pursuant to the terms of the contract, the respondent procured a purchaser for the property upon the conditions named in the agreement, and thereafter the appellant sold the property to the purchaser procured by the respondent; that the respondent was the sole and procuring cause of the sale, but nevertheless the appellant refused to pay the commission. The appellant for answer to the complaint denied that the respondent was the procuring cause of the sale, or that it had anything to do with bringing it about, and pleaded affirmatively a cancellation of the contract with the respondent prior to the sale. A trial was had before the court sitting without a jury, and resulted in findings and a judgment in favor of the respondent. This appeal follows.

The appellant's assignments of error all go to the question of the sufficiency of the evidence to sustain the findings and judgment. We have not thought it necessary, however, to review the evidence in detail. In brief it is made to appear that the appellant listed the property for sale with the respondent and also with certain other real estate brokers, among whom was a Mr. Oppenheimer; that the respondent, through its representative, one McGrory, thereafter found an intending purchaser desiring that character of property, in the person of William Knepp; that McGrory showed Knepp the property, who expressed a liking for it, going so far as to say that he would purchase the property provided

his wife was satisfied with it, and that he would take her out at once to view it; that McGrory on that day or the next met the appellant and told him that he had a purchaser for the property, telling him at the same time the name of the intending purchaser. Shortly thereafter Knepp, meeting with Mr. Oppenheimer on some other business and finding that he also had the property listed for sale, took up negotiations with the owner through him for its purchase, and thereafter concluded the same.

Under these circumstances we think the owner liable to the respondent for his commission. The essential thing required of a broker is that he procure an actual purchaser of the property, or a person who is ready, able and willing to purchase the property on the terms under which the broker has it for sale. If a sale is made he need not, in order to earn his commission, actually make the sale himself. It is enough that he introduce his purchaser to the owner, and the owner, as the proximate result thereof, makes the sale either personally or by another agent to the purchaser thus introduced. Here there is no doubt that the respondent found the purchaser, made him known to the owner, and that the owner sold to the purchaser through another agent, knowing that he was the customer of the respondent. The respondent was the procuring cause of the sale, and the appellant is liable to him for his commission. The judgment is affirmed.

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Opinion Per FULLERTON, J.

[No. 9521. Department One. August 16, 1911.]

FREDERICK D. MAYER, *Appellant*, v. QUEEN CITY LUMBER COMPANY, *Respondent*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—OPEN AND APPARENT DANGERS—DUTY TO WARN. An employee hauling timbers over rolls with a picaroon, along an unguarded walk, four or five feet wide, who fell where, for a space of fifteen feet, there was nothing between the walk and the ground ten feet below, must have known of and assumed the risks, as they were open and apparent; and he cannot allege negligence in failing to warn him of the danger of such open space, where he had passed it several times in his work.

Appeal from a judgment of the superior court for King county, Main, J., entered January 7, 1911, granting a nonsuit, in an action for personal injuries sustained by an employee in a sawmill. Affirmed.

Heber McHugh and *John T. Casey*, for appellant.

James B. Murphy, for respondent.

FULLERTON, J.—The appellant was injured while in the employ of the respondent, and brought this action to recover therefor. At the conclusion of his case in chief, a challenge to the sufficiency of the evidence was interposed, and sustained by the court, and a judgment of dismissal entered. This appeal is prosecuted to set aside the judgment so entered.

At the time of the injury to the appellant, the respondent owned and operated a lumber and shingle mill. The lumber mill proper was some 200 feet distant from a railroad track, and for the convenience of conveying heavy material from the mill to the track the respondent built a series of rollers across the intervening space. These rollers were constructed some twelve feet above the ground, and along one side of them was constructed a platform or walk, some 4 or 5 feet wide and some two and one-half feet below the top of the rollers, along

¹Reported in 117 Pac. 392.

which the employees walked while dragging timbers over the rollers. The space underneath the rollers for the greater part of the way was occupied by two sheds, having their tops just underneath the walk. The sheds, however, at the place of approach, some 100 feet from the mill, did not meet, and the effect was to leave a space about 15 feet wide where there was nothing between the platform and the ground below. The walk across the space was the same as it was elsewhere along the route, it was without railings or guards of any kind.

After a piece of timber had been placed upon the rollers at the mill, it was moved to the railroad by an employee who would strike the point of a picaroon into the body of the timber and drag it along the rollers by pulling on the handle of the picaroon. The appellant had been in the employ of the mill company for nearly a month prior to his injury, working in the sheds beneath the rollway. On the morning of the accident, he was directed to go to the sawmill and assist in hauling some timbers along the rollers from the mill to the railroad. He went as directed, and was given a picaroon and proceeded to haul timbers. He testified that he had never done any work of that kind before, although he had seen others do it and was familiar with the use of a picaroon, having had occasion to use the instrument while employed at another mill. The appellant in his turn stuck the picaroon into a timber and proceeded to haul it on its way. As he reached the gap between the sheds, the picaroon loosened from the timber and gave way suddenly. The effect was to throw the appellant onto the walk, from which he fell to the ground below. In the fall he received the injuries for which he sues in the action.

The theory on which the appellant sought to recover was that he was put to work in an unsafe place, and was given no warning of the danger he would encounter therein. His counsel claim in this court that his evidence conclusively shows that he fell while hauling the first piece of timber he attempted to haul; that the gap between the sheds was not

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clearly visible from the place where he started; and that he proceeded on his way in ignorance of the danger to be encountered at the gap, and fell because he had not been warned to look out for this particular danger. The trial judge found from the record that the appellant was familiar with his surroundings; that all of the dangers connected with the work were open and apparent; and that the appellant, by engaging in such work, assumed all risks of injury therefrom.

A perusal of the record convinces us that the evidence supports the court's theory of the case rather than that of the appellant. While in his direct examination he does leave the impression that he fell while attempting to haul the first timber he was directed to take and before he had passed over the way at all, his statements on cross-examination are more circumstantial. On being asked how many times he had been down the rollway prior to his injury, he answered: "Well, I can't say for certain, but, possibly that was the first or second time, or maybe, the third, I cannot swear. But this was the first day upon which I had been on the run-way." Again, he says he was "working alone, although there was another fellow on the same kind of work at the start, I believe, because I imitated him in using the picaroon;" and elsewhere he positively declines to say that he was injured on the first timber he attempted to haul, saying that he does not remember. There was no hidden defect causing the appellant's injury. All of the dangers were open and apparent to any one who had the opportunity to pass over the walk, and if it be true that the appellant hauled one or two pieces of timber prior to the one he was hauling at the time of his injury, he cannot be heard to say that he did not know of the dangers of the way. We think the record conclusively shows that he did know of the danger, and since this view accords with the judgment of the trial court, we will direct an affirmance of the judgment.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

[No. 9570. Department One. August 16, 1911.]

SYLVESTER TIBBITS, by C. G. Tibbits, as Guardian Ad Litem, Appellant, v. THE CITY OF SPOKANE, Respondent.

ELMER TIBBITS, by C. G. Tibbits, as Guardian Ad Litem, Appellant, v. THE CITY OF SPOKANE, Respondent.

MARCUS FITZGERALD, by W. J. Fitzgerald, as Guardian Ad Litem, Appellant, v. THE CITY OF SPOKANE, Respondent.¹

TRIAL—INSTRUCTIONS—STATEMENT OF FACTS. An instruction concisely informing the jury of the issues is not erroneous in failing to state the case or in failing to state the admitted facts, even though the pleadings were taken to the jury room.

EXPLOSIVES—NEGLIGENCE—PERSONAL INJURIES—INSTRUCTIONS. In an action for negligence in leaving dynamite caps and fuse where small boys could obtain them, an instruction correctly defining the degree of care required is not objectionable as presenting no issue of fact, nor because it leaves the jury to determine whether the caps and fuse were attractive to children of tender years.

NEGLIGENCE—EXPLOSION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—CHILDREN—QUESTION FOR JURY. In an action for negligence in leaving dynamite caps and fuse where they could be secured by boys aged from nine to thirteen years, the boys are not, as a matter of law, incapable of contributory negligence, but the question is one for the jury.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 2, 1910, upon the verdict of a jury rendered in favor of the defendant, in consolidated actions for personal injuries sustained by minors through the explosion of a dynamite cap. Affirmed.

W. H. Plummer and Latimer & Jones, for appellants.

Alfred M. Craven and Irving R. Davis, for respondent.

MOUNT, J.—These three actions were brought separately to recover damages for personal injuries. They arose out of

¹Reported in 116 Pac. 397.

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the same accident, and depend upon the same state of facts. After the issues were made up, the causes were consolidated and tried as one case to the court and a jury. Verdict was returned in favor of the defendant. The plaintiffs have appealed.

It appears that the city of Spokane, in June, 1909, was constructing some water mains within the city, and was making excavations for such mains. In making these excavations, blasting was necessary, and certain caps and fuses were used by the employees of the city. The boys, who were between nine and thirteen years of age, secured one of these fuses, to which a cap was attached, and they took it home, and in attempting to burn the covering from the wire fuse, they exploded the cap attached thereto and were injured. It was alleged that the employees of the city were negligent in leaving the fuse and cap where the boys procured it. The defendant denied that the city or its employees were negligent, but admitted that the boys took and carried away certain fuses. So that the real issue, and substantially the only one, in the case was whether the city or its servants were negligent in the use and care of the fuses and caps.

The boys testified that they found the unused fuse and cap lying under a tree, away from where the men were at work. The evidence of the city tended to show that the fuses and caps were kept locked up and securely put away when they were not being used; but while being used or prepared for use, that the employees were watching them at all times, and that the boys were warned of the danger, and told to keep away upon different occasions. The inference was, and the jury no doubt found, that the boys had stolen the cap and fuse without the knowledge of the employees of the city, and with notice of the dangerous character of the fuse and cap.

The only errors assigned go to the instructions of the court to the jury. Appellants argue, (1) that the court, in stating the issues, did not accurately state the case to the jury; and (2) that the court erred in stating that it was in-

cumbent upon the plaintiff to establish the allegations of the complaint by a preponderance of the evidence, without calling the attention of the jury to the admitted facts. There is no merit in these assignments; for the court told the jury that "each of the cases is based upon an allegation of negligence on the part of the servants of the defendant city in permitting these dynamite caps and other dangerous explosives to lie around on the ground where they could be found by children." "The answer of the defendant in each of the cases denies any and all negligence." And then the court, in instruction number 1, said:

"The burden is upon the plaintiff to establish the allegations of the complaint by the preponderance of the evidence, by which is meant the greater convincing weight of the evidence. Likewise in each of the cases the burden is upon the city to establish its affirmative defense; namely, that the boys themselves were negligent . . ."

The court thereby simply and concisely informed the jury of the issues in the case. But appellants argue that, in view of the fact that the jury took the pleadings to their room, they would be misled as to the admitted facts. We cannot assume that such result would follow. The issue was direct and simple, and in view of the clear statement by the court, it was not necessary for the jury to read the pleadings. But if they did so, we must give them credit for understanding sufficient to comprehend the issues there stated.

In its instruction number 2, the court told the jury that it was

"the duty of the defendant and its servants to exercise a high degree of care to prevent any one, particularly boys of tender years, from finding or getting the possession of such explosives, and particularly so if such explosive appliances were of such a character as to be attractive to boys and to excite their curiosity and cause them to examine, handle, and investigate such explosives."

It is said this instruction is inaccurate, because it presents no issue of fact, and that the explosives, as a matter of law,

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were attractive to boys of immature years. This instruction is not subject to the first criticism. It defined the care necessary to be exercised by defendant, and that was all the court intended for it. We think it properly left the jury to say whether these explosives were attractive to children. The instruction assumed that they were dangerous. Whether they were attractive depended upon facts which the jury must determine.

Appellants argue that the court erred in giving the following instructions:

"Any person who handles dangerous explosives must exercise reasonable care for his own safety, whether he be of mature or immature years. But clearly what would be reasonable care in a man of experience and mature years would not be such in a boy of inexperience and immature years, and it is for you to say whether or not these boys did exercise reasonable care for their own safety in handling this explosive, considering their age, their experience with and their knowledge of such explosives. Also whether they had had any notice or warning of the dangerous character of such explosives, the character of such explosive, whether it would have a tendency to excite the curiosity of boys, and any and all other circumstances shown by the evidence to exist and which would have a bearing upon the question."

"Now, if considering all these things, you should find that the boys at the time in question did not exercise reasonable care for their own safety and that their injuries resulted from their own negligence, then the plaintiffs could not recover and your verdict would be for the defendant, even though the defendant's servants were also negligent in the premises. But on the other hand, if you find that the boys were in the exercise of reasonable care for their own safety and that they were injured because of the defendant's servants, then the defendant would be liable and your verdict should be for the plaintiffs."

The contention is that the court should have instructed the jury that these boys were incapable of contributory negligence as a matter of law, because they were under the age of fourteen years. But this is not the rule in this state.

Roberts v. Spokane St. R. Co., 23 Wash. 325, 63 Pac. 506, 54 L. R. A. 184; *Boyer v. Northern Pac. Coal Co.*, 27 Wash. 707, 68 Pac. 348. In the last-mentioned case, in discussing the question of the understanding of minors, we said:

“There can be no fixed period when the minor may be held, as a matter of law, to appreciate danger which may surround him. His appreciation of danger would depend more upon his intelligence and experience than upon his age. . . So that the question of age, when compared with natural intelligence and past experience, may have very little influence in determining the ability of a minor to appreciate danger. . . the question whether or not the minor appreciated the danger to which he was subjected is usually a question of fact for the jury, under proper instructions,—not a question of law for the court.”

We think this is the correct rule, and that the instructions given were not erroneous.

Other instructions are criticized, but we do not find sufficient merit in the criticism to warrant further notice. We think the plaintiffs had a fair trial. Finding no error, the judgment is affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 9515. Department One. August 16, 1911.]

THOMAS MCCOY, *Appellant*, v. H. S. SIMON *et al.*,
Respondents.¹

PRINCIPAL AND AGENT—UNAUTHORIZED SALE OF MORTGAGE—RATIFICATION. The assignment of a mortgage by an attorney-in-fact of the mortgagee, in excess of his authority, is clearly ratified, and cannot be set aside as fraudulent, where, after notice thereof, the mortgagee treated with his agent and took security from him to cover the proceeds misappropriated by the agent, and failed to defend an action for foreclosure brought by the assignee, and there was no evidence of collusion or fraud on the part of the assignee.

¹Reported in 117 Pac. 400.

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Opinion Per MOUNT, J.

Appeal from a judgment of the superior court for Lincoln county, Warren, J., entered January 18, 1911, upon sustaining a challenge to the sufficiency of the evidence, dismissing, as to certain defendants, an action to vacate a tax sale and to quiet title. Affirmed.

James S. Freece and Latimer & Jones, for appellant.

Charles P. Lund, for respondents.

MOUNT, J.—The plaintiff brought this action to set aside a decree of foreclosure and a sale of certain real estate thereunder, and also to quiet title to the real estate in the plaintiff. The complaint is based upon alleged fraud and collusion against the plaintiff by defendants. The case was tried to the court without a jury. At the conclusion of the plaintiff's evidence, counsel for defendant challenged the sufficiency of the evidence, and moved to dismiss the action as to defendants Simon and Rothchild Brothers. This motion was granted, and the plaintiff has appealed from the judgment of dismissal as to these defendants.

It appears that, prior to the year 1905, plaintiff lived in the city of Sprague, in Lincoln county, where he owned several lots, some of which were improved. Mrs. Perry was a niece of the plaintiff, and she and her husband, Sherman Perry, made their home with him, living upon his property. Some time in the year 1904, or possibly in the year 1905, the plaintiff left the town of Sprague and went to the state of Oregon. In November, 1905, while the plaintiff was in Oregon, he executed and delivered to Sherman Perry a power of attorney, authorizing Mr. Perry to sell the real estate in the city of Sprague, and authorizing him to receive the consideration therefor. This power of attorney was duly recorded. Acting under it, Mr. Perry, on November 27, 1905, sold and conveyed one of the lots to one Gust Arndt, and received as consideration therefor \$1,000 in cash and a promissory note for \$1,537, secured by a mortgage upon the

lot. This note and mortgage matured on November 1, 1906. The note was made payable to the plaintiff. On December 27, 1905, Perry made an assignment of the note and mortgage to defendant H. S. Simon, for which Mr. Simon paid Mr. Perry the sum of \$1,800.

Thereafter, about January 1, 1906, Mr. Perry and his wife visited the plaintiff in the state of Oregon, and there informed him that the lot had been sold for \$2,800, \$1,000 of which was paid in cash, and that a mortgage for \$1,800, bearing interest at eight per cent per annum, was given for the balance; that the cash had been deposited in a bank at Sprague. Mr. Perry at that time did not inform plaintiff that he had sold the note and mortgage. On November 26, 1906, after the note became due and was not paid, the defendant Simon brought an action to foreclose the mortgage. The plaintiff was made a party along with the mortgagors, and was served by publication. No appearance was made in the action, and on February 27, 1907, a judgment of foreclosure was entered by default. Thereafter, on April 6, 1907, the property was sold to satisfy the mortgage. It was bid in by defendant Simon.

Soon after or about the time of these foreclosure proceedings, Mrs. Perry informed the plaintiff that Mr. Perry had speculated with the money obtained from the sale of the land, and had spent it all. The plaintiff about that time returned to Sprague and took up his residence with Mr. and Mrs. Perry. He knew that defendant Simon was in possession of the property, and he knew that Perry had sold the mortgage. After knowing these facts, the plaintiff treated with Mr. Perry and took from him a deed to a timber claim in Idaho, to secure the payment of the money which Perry had received from a sale of the land. There was no evidence whatever of any collusion or fraud on the part of Simon or Rothchild Brothers. The most that may be said is that the power of attorney from plaintiff to Perry did not authorize the latter to assign the mortgage, and that therefore Simon took the

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mortgage with notice of want of authority in Perry to assign it. But if this is true, it appears that, after the plaintiff knew of the sale of the property and of the mortgage and that Perry had used the proceeds, plaintiff treated with him and took property from him estimated to be worth about \$3,000, to secure the money which Perry had wrongfully spent. This was a clear ratification of the sale and of Perry's authority to sell the mortgage. *Ogden v. Marchand*, 29 La. Ann. 61. Plaintiff was therefore not entitled to recover against Simon, or innocent parties claiming under him.

The judgment must therefore be affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 9357. Department One. August 18, 1911.]

CLARENCE RAY DYER, *by his Guardian etc., Respondent*, v.
UNION IRON WORKS, *Appellant*.¹

MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL. A blacksmith having sole charge and control of a steam hammer and two helpers is a vice principal, and not a fellow servant, with reference to his act in putting the hammer in operation while a helper is in a dangerous position.

MASTER AND SERVANT—NEGLIGENCE—STARTING MACHINERY—EVIDENCE—QUESTION FOR JURY. It is for the jury to determine whether a blacksmith was guilty of negligence in starting a steam hammer before his helper had time to place a stop block in position and withdraw his hand from danger, where he himself testified that he placed the heated iron on the die before the block was in place and had to withdraw it, and there was evidence that the hammer was brought down catching the helper's fingers before they could be withdrawn.

SAME—CONTRIBUTORY NEGLIGENCE. In such a case, contributory negligence of the plaintiff is a question for the jury.

SAME—ASSUMPTION OF RISKS. In such a case, the helper does not assume the risk of the negligence of the blacksmith acting as vice principal.

¹Reported in 117 Pac. 387.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered November 7, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by a minor employed as a blacksmith's helper. Affirmed.

Post, Avery & Higgins, for appellant.

F. H. McDermont and Atwood A. Kirby, for respondent.

PER CURIAM.—This action was brought by the respondent, a minor, through his father as his guardian *ad litem*, to recover for personal injuries suffered by him while he was in the employ of the appellant. The respondent was employed as a blacksmith's helper, and received his orders from the blacksmith under whom he was working, both as to the character of work he should do and as to the manner in which he should perform it. At the time he was injured, the respondent was working under a blacksmith by the name of Allison; they were engaged, with the assistance of another helper, in shaping axles for a disc harrow. The axles were shaped one at a time. In performing the work, an axle was first heated in a forge to a welding heat, it was then carried to a steam hammer where it was hammered into the form desired, when it was brought back to an anvil near the forge and finished with hand hammers. The work at the steam hammer seems to have consisted of three processes. A piece of iron called a stop block was first inserted between the dies of the hammer, and the axle was then brought over, placed between the dies and hammered into a square having the thickness of the stop block. The block was then pushed off and a tip drawn on one end of the axle. A swedge with two molds was then placed between the dies, and the axle finally shaped by hammering it into these molds. It was then carried back to the anvil and finished with hand hammers as stated.

The respondent's first duty as helper was to place the stop block between the dies of the steam hammer. His second duty

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was to place the swedge therein, and his third to assist in the hammering at the anvil. The other helper operated the steam hammer and helped with the hand hammer at the anvil. The blacksmith handled the axle and directed the work of the others. There seems to have been no system of signals between the different workers. The respondent would start to put up the stop block as soon as the finishing work at the anvil was concluded, the other helper would start at the same time for the gauges operating the steam hammer, and the blacksmith would seize another heated axle and carry it to the hammer. The helper operating the hammer would start the hammer in operation as soon as he saw that the blacksmith had placed the iron between the dies. The axles were heated in the forge four at a time, and were finished with the one heating. It was necessary after the irons were once heated that the work proceed rapidly until all were finished.

The respondent was injured while putting the stop block in place. After concluding his work at the anvil, he started back to place the stop block, and was in the performance of the act when the blacksmith arrived with the heated axle. As the blacksmith placed the heated iron in the die the other helper started the hammer. The respondent did not succeed in entirely clearing himself from the hammer, and lost the ends of his fingers on one of his hands.

The respondent based his cause of action upon the claim that the blacksmith stood to him in the relation of a vice principal, and that the blacksmith was guilty of negligence, which negligence caused his injury. The appellant asserts the contrary of these propositions, and contends, further, that the respondent's injuries were caused by his contributory negligence, and that he assumed the risk of injury when he engaged to perform the work. A contention is made also that the question whether or not the blacksmith and the respondent were fellow servants was a question for the jury.

In support of its contention that the blacksmith and the respondent were fellow servants, the appellant has cited a

long line of cases from other jurisdictions presenting a state of facts similar to the facts in the case at bar and holding thereon that the employees so situated bore the relation of fellow servants. But this court has heretofore refused to follow the rule of these cases. We have held that where a master employs a number of servants to work with a dangerous agency and gives to one servant exclusive control of the agency with power to direct where the other servants shall work and the manner in which they shall work, the one given control is the representative of the master, that his negligence is the negligence of the master, and any one injured by reason of such negligence, not contributed to by him, has a cause of action against the master for the injury so suffered. *O'Brien v. Page Lumber Co.*, 39 Wash. 537, 82 Pac. 114; *Dossett v. St. Paul & Tacoma Lum. Co.*, 40 Wash. 276, 82 Pac. 273; *Westerlund v. Rothschild*, 53 Wash. 626, 102 Pac. 765; *Eidner v. Three Lakes Lumber Co.*, 45 Wash. 323, 88 Pac. 326. The facts bring the present case within this rule. The blacksmith, Allison, had sole charge of the steam hammer, and if he put it into motion while the respondent was in a dangerous situation and thereby caused an injury to the respondent, his act was that of a vice principal of the master and not a fellow servant of the respondent.

Whether or not the injury to the appellant was the result of negligence on the part of Allison was a question for the determination of the jury. After finishing one axle at the hammer, the respondent was entitled to sufficient time to go back to the steam hammer, place the stop block thereon, and get clear of the machine before this hammer was put in motion. It was a question for the jury in this case whether he was given that time, and if not given sufficient time, whether the failure so to do was negligence. That the blacksmith got to the hammer with the heated axle and placed it between the dies before the stop block had been put in position, he himself testified; in fact, he testified that, after placing the iron on the die, he discovered that the block was not

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in place, and withdrew the iron before the dies of the hammer were brought together. It was his duty to look out that the machine was ready for operation before he signaled for it to be put in operation, and the jury could well have found that he did not do it in this instance.

So, also, the question whether the respondent negligently contributed to his injury was for the jury. The facts as detailed do not conclusively point to such an inference.

Neither is the claim that the respondent assumed the risk of injury well founded. Undoubtedly he assumed the ordinary and obvious risks incident to the employment, as well as the special risks arising out of dangerous conditions known and appreciated by him, but he did not assume the dangers caused by the negligence of a vice principal. It was therefore for the jury to say whether the act causing the injury was one naturally connected with the due performance of the work, or whether it was the result of negligence on the part of the blacksmith, Allison.

As to the final objection, we are clear that in this case the question whether Allison was a vice principal or a fellow servant was one of law for the court, and not a question of fact for the jury. Under certain conditions, undoubtedly, the question can become a mixed question of law and fact, in which case it is proper to submit the question to the jury under instructions to find one way or the other as they find the facts to exist, but where the relation of the parties is undisputed, the question is ordinarily one of law.

The judgment is affirmed.

[No. 9555. Department One. August 18, 1911.]

**D. F. POWELL, *Respondent*, v. THE CITY OF WALLA WALLA
et al., *Appellants*.¹**

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—APPORTIONMENT OF COST—DISCRETION. It is within the discretion of city authorities to make a public improvement wholly at the expense of the property benefited, instead of partly at the expense of the public; and the courts have no power to control such discretion.

SAME—AMOUNT OF ASSESSMENT—DISCRETION. The judgment of municipal officers specially authorized to determine the amount of the benefits from a public improvement and assess the same upon specific property benefited is conclusive, and courts will not interfere unless it is so grossly excessive as to amount to a practical confiscation of the property.

SAME—ASSESSMENTS—PROPERTY SUBJECT—PUBLIC PARKS — LIMIT OF INDEBTEDNESS. As a public park cannot be assessed for benefits from a street improvement, the courts will enjoin an improvement of streets by a city where part of the cost was assessed against a public park, and the city had already reached its constitutional limit of indebtedness.

Appeal from a judgment of the superior court for Walla Walla county, Brents, J., entered February 20, 1911, in favor of the plaintiff, after a trial before the court without a jury, in an action to enjoin the execution of a contract for a public improvement. Affirmed.

J. W. Brooks, for appellants.

John C. Hurspool and *H. S. Blandford*, for respondent.

FULLERTON, J.—The city of Walla Walla undertook to improve a street therein between certain designated points at the expense of the property benefited by the improvement. To that end it, by ordinance, adopted the plans and specifications for the work, created an assessment district, caused the cost of the work to be ascertained, and levied an assessment on property thought to be benefited to pay the same. It was

¹Reported in 117 Pac. 389.

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about to enter into a contract for the performance of the work when this action was brought to enjoin it from so doing. The complaint was based chiefly on the contention that the assessment levied on the property within the assessment district exceeded the benefits conferred thereon by the improvement, and that it was unjust and inequitable not to impose a part of the cost of the improvement upon the city at large. It was also alleged, that a part of the territory through which the street proposed to be improved extended was not within the corporate boundaries of the city of Walla Walla; that the proposed improvement extended for a considerable distance in front of a city park; that the city had, without power or authority, undertook to assess a large portion of the cost on the park property; and that such part of the assessment was uncollectible, since no sale of the property could be had to enforce the assessment lien, and the amount thereof could not be made a charge upon the general fund of the city, as the city was then indebted beyond the limit fixed by the constitution.

On the trial, evidence was introduced tending to prove the allegations of the complaint, and the trial judge found,

“That in case said proposed contract be entered into and said improvement made, it will not enhance the value of said property, or any thereof, in an amount equal to the amount it will be required to pay for said proposed improvement, nor in any manner benefit said property, or any thereof, or the said plaintiff, or any of said other owners, in said amount; that the making of said proposed improvement will benefit other residents and property owners within the limits of said city and the public at large at least 1-4th as much as it will said plaintiff and said other property owners within said proposed assessment district; that the proposed placing of the entire cost of said proposed improvement upon the property of said plaintiff and other property within said proposed assessment district is discriminatory, unjust and inequitable, and that there are other good and sufficient reasons why said defendants should not be permitted to enter into said proposed contract.”

A decree was thereupon entered enjoining the city from entering into the contract. The city appeals.

The appellant contends, we think rightly, that the judgment cannot rest upon the grounds on which it was based by the trial court. Whether or not the cost of the improvement shall be borne wholly by the property benefited, wholly by the public at large, or in part by the property benefited and in part by the public at large, are questions solely within the jurisdiction of the municipal officers to determine, and the courts have no power to control their discretion in that regard. *In re Westlake Avenue*, 40 Wash. 144, 82 Pac. 279; *Bauman v. Ross*, 167 U. S. 548; *Sheley v. Detroit*, 45 Mich. 431.

So in regard to the amount of the assessment imposed on the specific tracts of property. The judgment of the assessing officers as to these amounts is ordinarily conclusive. The courts cannot ordinarily take the weight of opinion and substitute its judgment for the judgment of the officers specially authorized to make the assessment. The disproportion between the values imposed to those that may justly be imposed must be so great as to amount to a confiscation of property before the court is warranted in interfering. As said by Atkinson, J., in *Atlanta v. Hamlein*, 96 Ga. 381, 23 S. E. 408:

“As a general proposition, upon the question of benefit, whether general or special, the owner is concluded by an expression of the legislative will. Where power is conferred upon the municipal authorities, in their discretion, to inaugurate a system of street improvements, with the power likewise conferred of imposing upon the abutting lot owners a proportionate share of the cost of such improvements, such power may be well exercised by the city authorities without giving notice of any character to the lot owner; and it is inconsistent with the proper exercise of the taxing power, and would tend to a manifest embarrassment of the public in the prosecution of these public improvements, if, upon every assessment, the lot owner were entitled to have the question judicially determined whether or not he would be benefited

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by the proposed improvement. As to whether he was benefited or not, is a question which should address itself to the discretion of the municipal authorities. Their judgment upon this subject is ordinarily, except in the most extreme cases, conclusive; but, as we have before stated, it is not allowable that the municipal authorities, under the guise of a public improvement, should arbitrarily deprive the citizen of his estate. If, therefore, in the levy of such assessments, the cost of the improvement be so disproportioned to the value of the estate sought to be improved, as that the levy of the assessment amounts to a virtual confiscation of the lot owner's property, such assessment cannot be upheld as a legal or valid exercise of the power to tax for such improvements."

See, also, *In re Seattle*, 50 Wash. 402, 97 Pac. 444; *In re Seattle*, 46 Wash. 63, 89 Pac. 156; *In re Elliott Avenue & Milwaukee Street*, 54 Wash. 297, 103 Pac. 20; *In re Pine Street*, 57 Wash. 178, 106 Pac. 755.

We find nothing in the evidence warranting the conclusion that the assessments made were so grossly excessive as to amount to a confiscation of property. Certain witnesses, it is true, did testify that in their opinion their own property was overassessed, but the difference between their estimates and the assessment roll was hardly sufficient, even if their estimates be taken as absolutely correct, to warrant a charge as affecting their particular property, much less did it warrant the holding that the entire assessment was invalid.

The record, however, shows certain other facts. It is stipulated that a material part of the cost of the improvement was assessed against property purchased by the city for use as a city park, and it is stipulated also that the city of Walla Walla has reached the limit of indebtedness imposed on municipalities by the state constitution, and is without power to enter into a contract calling for the expenditure of money out of its general fund. These facts we think warrant the judgment entered by the trial court. The city cannot devote property purchased by it for use as a park to the improvement of a public street; hence, the attempted levy of an assess-

ment thereon is invalid in so far as it seeks to bind the property. The attempted levy might be, under other circumstances, equivalent to an appropriation out of the city's general fund of the amount sought to be levied, but it cannot so operate here, as the city is without power to make such an appropriation. The effect is to leave this part of the cost of the improvement unprovided for; and such being the condition, it is within the province of a court of equity to restrain the letting of a contract for the making of the improvement.

Our attention is called to the fact that we have heretofore held that a city might levy an assessment on the property of a public school district within its borders to pay the cost of a public improvement benefiting such property, and it is argued that the same principle would sustain the present levy. But, while we think we went to the extreme limit of the rule in that case, the cases are not analogous. A school district is in itself a corporate entity, having the power of taxation over the property within the confines of its district as well as the right of support from the public school funds. As between it and the city, therefore, its property can well be said to be private property. But it is not so with a city park. The park is but property of the city devoted to a particular use, and any assessment levied upon it must be satisfied either by the city itself or by a sacrifice of the park property. In itself it has no means of acquiring funds.

We conclude therefore that the judgment must be affirmed, and it will be so ordered.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

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[No. 9505. Department One. August 19, 1911.]

A. P. SNYDER, *Respondent*, v. LAMB-DAVIS LUMBER
COMPANY, *Appellant*.¹

MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGER. A common laborer in a wood yard, assisting in sawing wood at a circular saw, assumes the obvious risk of danger from contact with the saw, where he continued at work after objecting to the danger of sawing short lengths without any guards near the saw, and had had some experience with similar saws.

Appeal from a judgment of the superior court for Lincoln county, Neal, J., entered January 17, 1911, upon the verdict of a jury rendered in favor of the plaintiff, in an action for personal injuries sustained by an employee in a wood yard. Reversed.

Reeves & Reeves, for appellant.

A. J. Grant and *Martin & Wilson*, for respondent.

FULLERTON, J.—The appellant owns and operates a lumber and wood yard at Harrington, Washington. In the yard was a Morse-Fairbanks circular saw fitted on trucks, which was used for the purpose of sawing wood from cord lengths into shorter lengths. The saw was propelled by steam, and usually required a sawyer and two helpers to operate it, one to pass the wood to the sawyer, who placed it in position and pushed it against the saw, and a third to bear off the sawed pieces. On March 8, 1909, one Holmes was foreman of the appellant's yard. He had made a sale of wood calling for particular lengths and asked the respondent if he thought he could find some helpers and saw the wood needed. The respondent answered to the effect that he thought he could, and at once proceeded to find the helpers. Before he returned, Holmes had left the yard on other business, and a man by the

¹Reported in 117 Pac. 399.

name of Parker was left in charge. The respondent, on his return with the helpers, proceeded to the work of sawing, Parker acting as his offbearer. The order called for two lengths of wood, sixteen inch and twelve inch. After the longer had been cut, the respondent objected to sawing the shorter cuts, saying to Parker that it was dangerous because of the absence of guards near the saw on which to rest the last cut. Parker told him in answer that he thought it was all right and to go ahead. After sawing about three-fourths of a cord of the short wood, the respondent's hand caught in the saw and was severely lacerated. The respondent at this time was sixty-two years of age, had been working at common labor all his life, and had had some experience with saws of the character of the one on which he was injured, although he had never tried to operate that particular saw.

This action was brought by the respondent to recover for the injury suffered. At the trial of the action, on the foregoing facts appearing, the appellant moved for a directed verdict, which motion the court overruled. Thereafter the case was submitted to the jury, which returned a verdict in the respondent's favor. This appeal was taken from the judgment entered thereon.

The motion for a directed verdict should have been granted. The respondent did not sue under the factory act, but at common law, and he must be held to have assumed the risk of all dangers connected with the work he was employed to perform which were open and obvious and of which he had knowledge. In the light of the record, it seems idle to say he did not in this instance fully appreciate the dangers to be encountered. On the contrary, it is manifest that he knew and appreciated them fully, and that no amount of warning or instructions could have made him know or appreciate them more. It is for want of proper instructions that he seeks to recover, and this ground failing, he has no ground upon which to base a recovery.

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The judgment is reversed, and the cause is remanded with instructions to dismiss the action.

MOUNT and GOSE, JJ., concur.

[No. 9484. Department One. August 19, 1911.]

LILLY COMPANY, *Appellant*, v. NORTHERN PACIFIC RAILWAY
COMPANY, *Respondent*.¹

COURTS—JURISDICTION — COMMERCE — CARRIERS — DISCRIMINATION. The state courts have jurisdiction of an action brought by a shipper to recover for unjust discrimination by a common carrier engaged in interstate commerce, in violation of the act of Congress regulating interstate commerce, in view of § 22 of the act (U. S. Comp. Laws 1901, p. 3170) providing that nothing in the act shall abridge existing common law remedies; since the right existed at common law.

CARRIERS—DISCRIMINATION—ACTION FOR DAMAGES — COMPLAINT—SUFFICIENCY. In an action by a shipper for unjust discrimination by a common carrier, seeking to recover switching charges paid, a complaint alleging that the defendant falsely represented that such charges were paid by other shippers when in fact the defendant was absorbing or itself paying the switching charges of many other shippers, is insufficient where it fails to allege that the defendant had failed to comply with the provisions of the act to regulate commerce with reference to the filing of a schedule of rates and that the rate charge exceeded the rate shown on the schedule.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 21, 1910, upon sustaining a demurrer to the complaint, dismissing an action in tort. Affirmed.

John H. Allen, for appellant.

Geo. T. Reid, *J. W. Quick*, and *L. B. da Ponte*, for respondent.

FULLERTON, J.—This is an appeal by the plaintiff from a judgment dismissing its action after a demurrer to the complaint therein had been interposed and sustained.

¹Reported in 117 Pac. 401.

The complaint, after alleging the corporate capacity of the defendant and that it was a common carrier of both interstate and intrastate commerce, continued as follows:

"(3) That between the 6th day of July, 1904, and the 14th day of June, 1909, inclusive, the said railway company for hire, undertook and agreed to transport and deliver from said St. Paul and other points along its line of railway, freight in car load lots to be delivered to the said plaintiff at Seattle, state of Washington.

"(4) That the said defendant falsely and fraudulently represented to this plaintiff at said time that there was certain switching charges levied by its connecting carrier, Columbia & Puget Sound Railway Company, for switching said car load lots of freight in and onto said track, onto or near the warehouse of this plaintiff, so that said cars might and could be unloaded by this plaintiff, and that said switching charges were made and collected by said connecting carrier from all consignees from all points along its line of railway, and falsely and fraudulently represented to this plaintiff that said switching charges were charged and collected by said company from each and every and all of the consignees receiving freight in car load lots over said Northern Pacific Railway Company's line into Seattle situated in all respects similar to this plaintiff, when in truth and in fact said defendant was absorbing or paying itself the said switching charges of many other consignees so situated as aforesaid and from same point or points in all respects similar to those from which plaintiff's freight was shipped as aforesaid, and by means of said false and fraudulent representations by the said defendant, this plaintiff was induced to, and did, pay to the Columbia & Puget Sound Railway Co., between said times the sum of one thousand ninety and 50-100 (\$1090.50) dollars, to the damage of this plaintiff in said sum.

"(5) That this plaintiff for the first time on or about, to wit, October 27th, 1909, discovered that the said representations, by and through which and by means of which the defendant caused this plaintiff to pay the sum of one thousand ninety and 50-100 (\$1090.50) dollars as aforesaid were false and untrue, and by means of which this plaintiff was damaged by an unjust and illegal discrimination in said sum of one thousand ninety and 50-100 (\$1090.50) dollars."

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The demurrer was based on two grounds, first, that the court was without jurisdiction of the subject-matter of the action; and second, that the complaint did not state facts sufficient to constitute a cause of action. The complaint, it will be observed, is founded on the assumption that the respondent, a common carrier, made unjust discriminations to the appellant's damage in freight charges for interstate commerce shipments between the shipments of the appellant and other shippers similarly situated.

The first branch of the demurrer suggests the question whether the act to regulate commerce, and the acts amendatory thereof, enacted by the Congress of the United States, have taken away a shipper's right to maintain an action in the state courts for unjust discrimination on the part of a common carrier of interstate commerce. We do not think that it did, or was so intended. While the ninth section of the act (U. S. Compiled Laws 1901, p. §159) might seemingly confine the remedies for such a breach of duty to the commission provided for by the act, or to the district or circuit courts of the United States, the twenty-second section (*Id.*, p. §170-71), which was inserted to more clearly define the operation of the act, provides that "nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies." This restriction on the prior provisions of the act makes it clear that the Congress did not intend to take away the jurisdiction of the state courts to maintain actions for breaches of duty in the carrier which would give rise to a cause of action at common law or under the state statute. *Illinois Cent. R. Co. v. Henderson Elev. Co.*, 138 Ky. 220, 127 S. W. 779; *Southern Pac. Co. v. Crenshaw*, 5 Ga. App. 675. The common law, as administered by the American courts at least, gave a shipper a right of action against a common carrier for a discrimination in freight rates between the shipper and another similarly situated, whenever the effect of the discrimination was to injure

the shipper in his trade or business. All discriminations were not actionable, but unjust and unreasonable discriminations, those that operated to the special injury of the shipper against whom the discrimination was made, were clearly so. *Scofield v. Railway Co.*, 43 Ohio St. 571, 54 Am. Rep. 846; *Messenger v. Pennsylvania R. Co.*, 36 N. J. L. 407, 13 Am. Rep. 457; *McDuffee v. Portland & Rochester R.*, 52 N. H. 430, 13 Am. Rep. 72; *Kellogg v. Sowerby*, 93 App. Div. 124, 87 N. Y. Supp. 412; *Vincent v. Chicago etc. R. Co.* 49 Ill. 33. We think, therefore, that the superior court had jurisdiction of the subject-matter of the appellant's action.

On the second ground stated, the demurrer was properly sustained. It will be observed that the appellant does not allege that the carrier had not complied with the provision of the act to regulate commerce with reference to filing a schedule of rates, nor does it allege that by the rate charged it exceeded the rate shown on the schedule. Since there is no allegation of a violation of the law in these respects, it will be presumed there was no such violation. The allegation, therefore, that the respondent was absorbing or was itself paying the switching charges for many other consignors situated similarly to the appellant, must mean that these consignors were getting their freight hauled at less charge than the scheduled rate. In other words, the allegations in the complaint amount to an allegation to the effect that the respondent, under like circumstances and conditions, hauled freight for certain other persons at a less rate than its scheduled rate, and falsely and fraudulently represented to the appellant to the contrary. But clearly this alone does not state a cause of action, either at common law or under the statute. At common law, as we have shown, a shipper could recover for unjust and unreasonable discriminations only, when they operated to his injury. He could not recover damages because of the mere fact that the carrier had carried freight for some other person at a less rate than he had been charged. All he could exact for himself was a reasonable

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rate, and good faith on the part of the carrier; namely, that the carrier would not so manipulate its charges as to injure him in his trade or business. The act to regulate commerce goes no farther in this respect than the common law rule. It provides (§ 8) that in case any common carrier subject to the provisions of the act shall do, cause to be done, or permit to be done any act, matter or thing therein declared to be unlawful, it shall be liable to the person or persons injured thereby for the full amount of damages suffered. The person injured only can recover. No right of action is given to one shipper of freight merely because another shipper obtained a less rate than the schedule rate or the rate that was accorded the first shipper.

The appellant's complaint is based on the contrary assumption. He alleges that "many" consignors of freight procured their freight shipped without paying the additional switching charges complained of, and draws the conclusion, from that fact alone, that it can recover all of the switching charges it has paid on similar hauls for a series of years, regardless of the question whether it is specially damaged or not. If this doctrine be sound, any person who has shipped freight on a common carrier has a right of action against the carrier if he can find that the carrier has ever hauled freight of similar kind under similar circumstances for less charge than he paid for his own shipment. But the doctrine is not sound. It would allow a recovery by a private person where no injury is suffered, which is contrary to the first principles of justice.

The judgment is affirmed.

DUNBAR, C. J., MOUNT, and GOSE, JJ., concur.

[No. 9371. Department Two. August 19, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Norbert R. Sylvester et al., Plaintiff, v. THE SUPERIOR COURT FOR BENTON COUNTY, Respondent.*¹

MUNICIPAL CORPORATIONS—USE OF STREETS—FRANCHISE—TO RAILROADS—POWER TO GRANT. A city may grant a franchise to a railroad company to occupy a portion of a city street where the same does not exclude the public therefrom; and a franchise prohibiting an exclusive use at present or at any time in the future is valid.

EMINENT DOMAIN — USE OF STREETS — EXTENT — PROCEEDINGS — FRANCHISE. The nature of a railroad's occupancy of a city street is not to be determined by its petition to condemn against the abutter, nor by the order of necessity, but by the terms of the franchise.

MUNICIPAL CORPORATIONS—USE OF STREETS—FRANCHISE—TO RAILROADS. Authority to grant to a railroad company a franchise to lay tracks lengthwise in a street is conferred by Rem. & Bal. Code, § 7731, subd. 13, authorizing permits to lay railroad tracks and run cars drawn by horses, steam, or other power thereon.

EMINENT DOMAIN—PROPERTY SUBJECT—STREETS. A railroad company may condemn a right to lay tracks in a street as against the rights of abutting owners, if it has a lawful franchise to use the street.

EMINENT DOMAIN—LOCATION—CHANGE. A railroad company may make a change in its location in order to correct an error in engineering, where it was found that high water in a river did not admit of a grade line upon the route as surveyed and adopted; both at common law and by virtue of Rem. & Bal. Code, § 8738 providing for such changes.

EMINENT DOMAIN—LOCATION—NECESSITY. The selection by a railroad of a route for a change in its location necessitated by an engineering error makes a *prima facie* case of necessity, which is conclusive in the absence of evidence of a more suitable and less injurious route; and the selection of a street does not show an abuse of power.

MUNICIPAL CORPORATIONS—ORGANIZATION—CHANGE IN CLASSIFICATION—OFFICERS—ORDINANCES. After a town of the first class is raised to a city of the third class, the councilmen of the old cor-

¹Reported in 117 Pac. 487.

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poration continue to act and have power to pass ordinances until the organization of the new corporation by the election and qualification of new officers at the next general election, pursuant to the provisions of Rem. & Bal. Code, § 7488, providing that it shall be a city of such class upon certification to the secretary of state and that notice thereof shall be taken when the corporation is actually organized by the election and qualification of its officers, and Id., § 7489, providing that the old officers shall act until the next annual municipal election and officers of the new corporation are elected and qualified.

MUNICIPAL CORPORATIONS—ORDINANCES—DEFECTS—COLLATERAL ATTACK. Reference in a franchise ordinance of the "town" of K., to "city" of K., signed and sealed by the clerk of the "city" of K., are mere informalities that do not affect the validity of the franchise, when attacked by private persons or in collateral proceedings.

Certiorari to review an order of the superior court for Benton county, Frater, J., entered January 23, 1911, adjudging a public use and necessity in proceedings to condemn property for railway purposes. Affirmed.

Moulton & Henderson, for relators.

Danson & Williams (George D. Lantz, of counsel), for respondent.

ELLIS, J.—The relators, by certiorari, seek a review of findings of public use and necessity made by the respondent court in eminent domain proceedings instituted by the Oregon-Washington Railroad & Navigation Company to condemn the property rights of relators as owners of lots abutting upon Front street, in the city of Kennewick. Relators' lots abut upon the southerly side of the street, with a frontage thereon of about seventy-five feet. The railroad company proposes to construct, on the north thirty feet of the street, a double track railway as a part of its main line. Prior to the institution of the proceedings, the town of Kennewick, by ordinance, the validity of which is questioned, granted to the company a franchise to build and operate its road on the street. On April 24, 1908, prior to the date of this franchise, the North Coast Railroad Company, grantor of the Oregon-

Washington Railroad & Navigation Company, adopted a different line through the city, and condemned a portion of its right of way thereon. The Oregon-Washington Railroad & Navigation Company is still occupying a part of this prior location with its tracks.

The relators first contend that the railroad company, under the laws of this state, could acquire no right to occupy any portion of the street, either with or without the consent of the city council. This, aside from the question of statutory authority, must depend upon the nature of the proposed occupancy. In *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576, we held that the city of Spokane had no power to grant to a railway company the right to occupy any part of the street to the entire exclusion of the public, and in effect that the grant of a franchise purporting so to do was *ultra vires*. In that case the franchise purported to authorize the railway company to make a cut in the street thirty-two feet wide and support its sides with walls of masonry, with a substantial iron fence on top of the walls effectually excluding the public from the portion of the street so occupied. It is claimed that case is decisive of the question here, because the petition for condemnation alleges that "It is necessary and required by said petitioner for it to appropriate and use all of said north thirty feet of Front street," and because the order of necessity is couched in similar terms. But the nature of the occupancy proposed is determined neither by the petition to condemn against the abutter nor by the order of necessity. It must be determined by the terms of the franchise.

In *State ex rel. Sylvester v. Superior Court*, 60 Wash. 279, 111 Pac. 19, we held that the right to condemn against the abutter is dependent upon the right to occupy the street as against the public. As a corollary the grant from the public is the measure of the occupancy proposed in the condemnation. The franchise here in question does not authorize an exclusive occupancy. It provides that the tracks shall con-

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form in every respect to the established grade of the street; that trains shall not be permitted to stand between Washington and Seventh streets for a longer period than five minutes; that the tracks shall not be used for the storage of cars; that the company shall not block crossings for longer than five minutes at a time; that the tracks shall be used for no other purpose than as a main line for the passing of trains; that all telegraph and telephone wires used by the grantee shall be placed underground; that the crossing at Pacific street shall never be blocked by standing trains except in cases of unavoidable emergency, and then no longer than absolutely necessary; that the grantee shall not impede ordinary traffic or subject the public to unnecessary danger or inconvenience resulting from constructing, operating, or maintaining the tracks. The franchise thus not only prohibits a present exclusive use, but guards against the use ever becoming exclusive. The contrast with the case of *State ex rel. Schade Brewing Co. v. Superior Court, supra*, is plain.

It is further urged that the council of Kennewick had no statutory authority to grant a franchise to lay tracks lengthwise on the streets, and that before such a franchise could be granted, such power must be conferred by statute in express terms or by necessary implication. But in this state the statute defining the powers of the council of fourth class cities or towns expressly confers that authority. Rem. & Bal. Code, § 7731, subd. 13, is as follows:

“(13) To permit, under such restrictions as they may deem proper, the laying of railroad track and the running of cars drawn by horses, steam, electricity or other power thereon; and the laying of gas and water pipes in the public streets; and to construct and maintain, and to permit the construction and maintenance of telegraph, telephone and electric light lines therein.”

The semicolon found after the word “thereon” in the above provision was plainly used by inadvertence instead of a comma. Practically the same provision is found with refer-

ence to third class cities, but a comma there appears instead of the semicolon. Rem. & Bal. Code, § 7685, subd. 13. Counsel contends that this is no more than authority to grant to the railroad company the right to construct and operate its lines within the city limits and across streets where necessary. This is not warranted by the context. It will hardly be contended that the right to lay tracks lengthwise on the streets for cars drawn by horses or electricity may not, under this statute, be authorized by the council, yet the power is no more explicit as to tracks for cars so drawn than as to tracks for cars drawn by steam or other power. The power is conferred by the same words. To read into the statute the word "across" is to legislate, not to construe. Authorities are cited in this connection relating to the exercise of the power of eminent domain as against municipalities for the taking of public grounds for another public use, and to other questions touching the power of eminent domain. They are foreign to the matter here involved, and no useful purpose would be served by reviewing them.

The primary question here is as to the right to grant the franchise, not as to the right to exercise the power of eminent domain. It must be conceded that the right to condemn as against the relators exists if the power to grant the franchise existed and was properly exercised by the city. *Lund v. Idaho & Washington N. R.*, 50 Wash. 574, 97 Pac. 665.

It is next contended that, by the prior and different location of April 24, 1908, the railroad company had exhausted its power of eminent domain, and could not make a change of location without statutory authority. It is unquestionably the law that a general or unnecessary change cannot be made without such authority. The general rule is as quoted by counsel from 1 Lewis on Eminent Domain (3d ed.), § 402, which, after stating that the power to locate a general route is usually given to the corporation either by charter or general statute, continues:

"When the choice or discretion which is thus given has been

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exercised, the power is exhausted, and the location cannot be changed, in the absence of a statutory provision permitting such changes to be made. 'The general rule is,' says the court in one case, 'that where the *termini* and general route of a railroad are prescribed by the charter, leaving the determination of details to the discretion of the corporation, the power of the company to fix the location of the road is exhausted after such discretion has been exercised, and it cannot relocate its road without statutory authority to do so, and being without power to relocate its road the company is without power to condemn a right of way for a line which it cannot lawfully locate.' "

But the author adds:

"But this principle is not to be applied too rigidly. A general or material change of location cannot be made. But minor changes can be made, which experience or change of circumstances have demonstrated to be necessary or desirable. The growth of a town in a certain direction may make a former location of a depot very inconvenient. A railroad may be destroyed by a mountain slide or a washout in such a way that reconstruction would be impracticable or impossible. In such cases it seems to us a change of location may be made so as to obviate the inconvenience in the one case or the difficulty in the other. And so are the authorities."

33 Cyc. 131, after stating the general rule, also adds:

"But that such changes may be made as are necessary to correct errors in engineering or to avoid obstacles which would defeat or interfere with a proper construction of the road, the railroad company being liable for the damages already actually sustained by landowners by reason of the prior location."

See, also, *Hagner v. Pennsylvania S. V. R. Co.*, 154 Pa. St. 475, 25 Atl. 1082; *Collier v. Union R. Co.*, 173 Tenn. 96, 83 S. W. 155; *Whalen v. Baltimore & O. R. Co.*, 108 Md. 11, 69 Atl. 390, 129 Am. St. 423, 17 L. R. A. (N. S.) 130; *Ligat v. Commonwealth*, 19 Pa. St. 456.

The chief engineer of the company testified that the change of location was made because:

"It was found that the high water of the Columbia river

would not admit of a grade line upon their location as surveyed and adopted, without exposing the railroad company to the high water of the Columbia river. For that reason the location upon the north side of the Northern Pacific right of way, as a main line extending towards Walla Walla, was impracticable."

We think that the situation here described is sufficient to invoke the exception to the general rule recognized by the above authorities. But in any event, statutory authority is not wanting in this state. Rem. & Bal. Code, § 8738, reads as follows:

"Any corporation may change the grade or location of its road or canal, not departing from the general route specified in the articles of incorporation, for the purposes of avoiding annoyances to public travel, or dangerous or deficient curves or grades, or unsafe or unsubstantial grounds or foundation, or for other like reasonable causes, and for the accomplishment of such change shall have the same right to enter upon, examine, survey, and appropriate the necessary lands and materials as in the original location and construction of such road or canal."

This section was originally § 3 of chapter 3 of the act of 1873, Laws of 1873, p. 412. Counsel cite *State ex rel. Schade Brewing Co. v. Superior Court*, 62 Wash. 96, 113 Pac. 576, as authority that this section does not apply to railroad corporations. In that case it is questioned whether the word "road," used in §§ 4, 5, and 6 of the chapter, has any reference to the railroad or railway corporations referred to in §§ 1 and 2 of the chapter. This court, however, did not construe § 3 in any manner. Sections 1 and 2, found in Rem. & Bal. Code, as §§ 8739 and 8740, provide that a corporation organized for the construction of any railroad, macadamized road, plank road, clay road, etc. may condemn land. The word "railway" is used in the codification (Rem. & Bal. Code, § 8739); the word "railroad" in the original act (Laws 1873, p. 411). It will be observed that the section above quoted though using the word "road" begins with the words "any

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corporation," thus indicating a clear intention to apply this section to any of the corporations designated in §§ 1 and 2 immediately preceding. The subject-matter of § 3 further makes this plain. It relates to change of grade or location to avoid dangers etc., and it is self-evident that this power is even more necessary in the case of railroads than in the case of the other roads mentioned in §§ 1 and 2. The same reasons do not apply to §§ 4, 5, and 6, which were construed as not including railway corporations in the *Schade* case, *supra*. We therefore conclude that the change of location, under the circumstances shown by the record, was warranted, and that the statute is but declaratory of the rule of law applicable in such cases in the absence of statute.

It is asserted that the thing here sought is not a change of, but an additional location. The evidence, however, shows the adoption of a new main line, and it is uncontradicted that the old location is being used only for construction purposes. The railroad company disclaims any intention of continuing its use as a main line.

Again, it is urged that the evidence fails to show a necessity for locating the line upon Front street. While we held in *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*, *ante* p. 189, 116 Pac. 855, that the question of necessity is, under Rem. & Bal. Code, § 925, a judicial question to be determined on evidence, we also there held that the selection by the condemnor makes a *prima facie* case of necessity which can be overcome only "by clear and convincing proof that the taking of the specific land sought would be so unnecessary and unreasonable as to be oppressive and an abuse of the power." The selection by the railroad company of the location on Front street was proved. It established *prima facie* the necessity of that location. The only evidence suggested as tending to the contrary is the fact that this is a public street, and that there is private property available. This, however, is far from showing an abuse of power. It does not even tend to show that the condemnation of relators'

interest in the street is more injurious or damaging to them than would be the actual taking of their abutting lots. The evidence shows that a change of location was necessary, and it fails to show that any other than the changed location selected was more suitable for the company and less injurious to others. The necessity was sufficiently shown.

Finally, the relators contend that the franchise was void, because it was passed by an affirmative vote of only four members of the council after an election advancing Kennewick from a town of the fourth class to a city of the third class had been held. This election was held on May 24, 1910. On November 15, 1910, the ordinance granting the franchise was passed. On December 6, 1910, the first election of officers for the municipality as a city of the third class was had. Towns of the fourth class have five councilmen, and the affirmative votes of three of them are necessary to grant a franchise. Rem. & Bal. Code, §§ 7720 and 7730. Cities of the third class have seven councilmen, and the affirmative votes of five of them are necessary to grant a franchise. Rem. & Bal. Code, §§ 7672 and 7683. The law governing the advancement of towns and cities is found in Rem. & Bal. Code, §§ 7482 to 7489, both inclusive. The first six of these sections relate to procedure. The other two are as follows:

“Sec. 7488. It shall be the duty of the said board to cause a record of such action to be made, and when the clerk of said board shall make the record, he shall certify and forward to the secretary of state a transcript of the same, whereupon such corporation shall be a city of the third, second, or first class, as the case may be, to be organized and governed under the provisions of this act; and when the corporation is actually organized by the election and qualification of its officers, notice of its existence as such shall be taken in all judicial proceedings.

“Sec. 7489. The first election of officers of the new corporation shall be at the first annual municipal election after such proceedings, and the officers of the old corporation shall remain in office until the officers of the new corporation are elected and qualified; and the ordinances, by-laws, and reso-

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lutions adopted by the old corporation shall, as far as consistent with the provisions of this act, continue in force until repealed by the council of the new corporation; and the council and officers of the old corporation shall, upon demand, after the expiration of their term of office, deliver to the proper officers of the new corporation all books, records, documents, and papers in their possession belonging to the old corporation."

The declaration in the section first quoted, that upon the forwarding of the transcript to the secretary of state the corporation shall be a city of the advanced class, can mean no more than that it then becomes a potential city of that class; that is, a city with power to organize as a city of the advanced class. This is shown by the last clause of the section, which provides for its recognition as such only when it is *actually organized* by the election and qualification of its officers. This is confirmed by the next section, which provides for the retention of the officers of the old corporation until officers for the new are elected and qualified. It was never intended that there should be an interval of uncertainty as to the powers and duties of officers between the election determining the advancement and the next annual municipal election actually organizing the new corporation. It is essential to orderly administration and certainty of authority that the transition from one class to the other be consummated at a fixed and definite time. Obviously that time is, and should be, when the new officers qualify. So read the authorities. In *Ritchie v. South Topeka*, 38 Kan. 368, 16 Pac. 332, practically the same question was presented. The legality of an ordinance levying a tax was questioned on the ground that no quorum of the council was present when it was passed. South Topeka was a city of the third class with five councilmen. The governor by proclamation advanced it to a city of the second class. Such cities had eight councilmen. A majority in each case constituted a quorum. After the proclamation and before the qualification of the new officers, the ordinance was passed

by a vote of four councilmen, being all who were present. The court said:

“What was the *status* of the city of South Topeka at this time? It was declared to be a city of the second class by the governor’s proclamation of June 4, 1886, but its municipal government was not fully organized until some time after that date. In *Campbell v. Braden*, 31 Kan. 754, 3 Pac. 542, this court suggests that it necessarily requires time for such organization to be completed, and in this case we cannot say there was an unreasonable delay. It would not be completed until its officers, including the councilmen, were elected. The proper evidence of their election would be the canvass of the vote by the proper authorities. This was not done at the time of the levying of this tax; and therefore the city of South Topeka at that time was acting, so far as its officers were concerned, as a city of the third class. It is necessary that there should be some city government at all times, and the mere proclamation of the governor changing the form of the city from a city of the third to a city of the second class, did not leave the city without a city government; and of necessity, until the officers of the city as a city of the second class qualified as such officers, the old form of government, and the old officers, would continue. We think that the ordinance complained of was valid.”

See, also, *State ex rel. Fremont etc. R. Co. v. Babcock*, 25 Neb. 709, 41 N. W. 654; *In re Assessment etc., Passaic*, 54 N. J. L. 156, 23 Atl. 517; *State ex rel. Williams v. Brooks*, 58 Wash. 648, 109 Pac. 21; 28 Cyc. 429; *Hutchinson v. Belmar*, 61 N. J. L. 443, 39 Atl. 643.

But it is claimed the ordinance must be held an ordinance of a city of the third class, because it has the appropriate enacting clause which is different from that of a town of the fourth class; because the ordinance refers to the municipality as the “city of Kennewick”; because it is sealed with the seal and attested by the clerk of the city of Kennewick; and because the acceptance and bond of the railroad company run to the city of Kennewick. All of these things are mere irregularities, since the power to grant the franchise existed and it was actually passed by the statutory vote required for

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towns of the fourth class. These irregularities do not make the ordinance void. Under such circumstances the decided trend of authority sustains the franchise when attacked by private persons or in collateral proceedings.

"An ordinance passed which the corporation has no power to enact, as one levying a tax for a purpose not authorized by the charter, is an act of usurpation and all proceedings under it are void; yet where the corporation has power to pass the ordinance for a certain purpose, but exercises that power in an unauthorized manner the ordinance is valid and binding until set aside by legal proceedings instituted for that purpose, and its validity cannot be brought in question collaterally, as a matter of defense to an action under it." McQuillin, *Municipal Ordinances*, § 279.

See, also, *California Reduction Co. v. Sanitary Reduction Works*, 126 Fed. 29; *Truckee etc. Road Co. v. Campbell*, 44 Cal. 89; *Tennessee Coal, I. & R. Co. v. Birmingham S. R. Co.*, 128 Ala. 526, 29 South. 455; *Stedman v. Berlin*, 97 Wis. 505, 73 N. W. 57.

There being no reversible error in the record, we affirm the findings of use and necessity and order for trial.

DUNBAR, C. J., CROW, MORRIS, and CHADWICK, JJ., concur.

[No. 9421. Department Two. August 19, 1911.]

MILAN STILL *et al.*, *Respondents*, v. PALOUSE IRRIGATION &
POWER COMPANY *et al.*, *Appellants*.¹

WATERS AND WATER COURSES—RIPARIAN RIGHTS—NATURAL FLOW—FLOOD WATERS. A lower riparian owner is entitled to the natural flow of the stream at regular flood seasons beneficially flooding his lands, and can restrain the impounding of such flood waters by an upper riparian owner, and their release during the summer months, to his damage, where such waters are not extraordinary and unprecedented but a usual and natural condition.

WATERS AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION—STATUTES. The doctrine of riparian rights for irrigation purposes as to lands acquired from the government subsequent to March 3, 1877, has not been abrogated by the act of that date (19 Stat. at L. 377), providing that surplus waters over and above actual appropriation and use, and waters in all lakes and rivers upon the public domain, shall remain and be free from the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing right; since the act relates only to the reclamation of desert lands.

WATERS AND WATER COURSES—APPROPRIATION—PRIORITY—DILIGENCE—EVIDENCE—SUFFICIENCY. An appropriation of water, prior to the vesting of riparian rights in 1897, by the application of water to irrigation purposes, is not established, reasonable diligence being lacking, where an irrigation company first started an appropriation in 1893, which was forfeited by the failure of the company and abandonment of the work, and that was followed by slight efforts toward the use of water in 1897, and an appropriation and considerable diligence in 1907.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered August 8, 1910, upon findings in favor of the plaintiffs, after a trial on the merits without a jury, in an action to enjoin the obstruction of the waters of a creek used for irrigation purposes. Affirmed.

Cannon, Ferris, Swan & Lally, for appellants.

Milan Still, for respondents.

¹Reported in 117 Pac. 466.

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MORRIS, J.—It was sought in this suit to enjoin defendants from constructing and maintaining a dam across the mouth of Rock lake, for the purpose of utilizing the lake as a storage reservoir. The court below so decreed to the defendant Irrigation & Power Company, from which this appeal is taken.

Rock lake is a navigable body of water, about nine miles long and from one-half a mile to three miles wide. Its outlet is Rock creek, which flows westerly to a junction with Palouse river. Respondents are the owners of lands about ten miles west of Rock lake, through and across which Rock creek flows. The appellant company is the owner of lands bordering the mouth of the lake; also lands riparian to the Palouse river below its junction with Rock creek, and other lands still farther down in the Washtucna coulee. Respondents' lands are in four tracts, and were acquired at different times; two tracts by Federal patent in 1901 and 1902, and two by purchase from Federal grantees in 1897 and 1904. Rock creek is a small stream, but in the late winter and early spring the rains and melting snow cause the waters of the lake to rise, increasing the flow of the creek until it flows through natural channels over respondents' lands, covering in flood season about one hundred acres, which, by reason of its deposits and watering of the land at a time when the crops are dormant, is of great benefit to respondents. For the purpose of utilizing these flood waters and controlling the flow over their lands, respondents have constructed small dikes and dams across the overflow channels. They have also a small irrigating system to reach lands not covered by the overflow.

The appellant company in 1909 and 1910 constructed a dam three feet high across the mouth of the lake, its purpose being to use the lake as a reservoir for the impounding of its waters. The dam is constructed with gates, and the contemplated purpose is to leave the gates open until the flood waters of the early spring rise above the dam, when the gates will

be closed, and a body of water, three feet deep over the entire area of Rock lake, about 6,600 acre feet of water, impounded for use in the summer months, in the irrigation of appellant's lands upon the Palouse river and in the Washtucna coulee. The court below found that the erection and maintenance of this dam as contemplated by appellant would be an unreasonable detention and obstruction of the wonted flow of Rock creek over and through respondents' lands, and entered a decree accordingly.

There can be no doubt but that the scheme of appellant, if permitted to impound the waters of the lake in the spring months, would cause a serious interference with respondents' use of the waters of Rock creek, diminishing and curtailing its natural flow, wholly preventing the annual spring overflow upon respondents' lands, which is their greatest asset and factor of value, except as appellant might at its option release the waters of the lake through the gates of its dam. Such an alteration in the natural flow of a stream is not permissible. A riparian owner, such as respondents are here shown to be, has a right to the natural flow of waters in their natural and accustomed channels without diminution or alteration, subject only to the same right and use in every other riparian owner, a right that is as much included in the ownership of the land as the soil itself, and can no more be interfered with by the acts of others. And while the application of this doctrine has in some of the western states sometimes been denied, on the theory that the rules of the common law respecting riparian owners were inapplicable to conditions and necessities of the people in the particular localities where the cause of action arose, it has, since its first announcement here, invariably been upheld in this state, except where it has been subjected to a priority of appropriation. *Crook v. Hewitt*, 4 Wash. 749, 31 Pac. 28; *Rigney v. Tacoma Light & Power Co.*, 9 Wash. 576, 38 Pac. 147, 26 L. R. A. 425; *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107; *New Whatcom v. Fairhaven Land Co.*,

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24 Wash. 493, 64 Pac. 735, 54 L. R. A. 190; *Madson v. Spokane Valley Land etc. Co.*, 40 Wash. 414, 82 Pac. 718, 6 L. R. A. (N. S.) 5; *McEvoy v. Taylor*, 56 Wash. 357, 105 Pac. 851, 26 L. R. A. (N. S.) 222.

The contemplated detention of the waters of Rock creek, through their impounding in the lake, practically amounts to a total detention at unknown times, when, with their natural spring flow, they would be serving their best purpose to respondents. Water may not thus be gathered into reservoirs for future use, when it may best suit the convenience and use of one riparian owner, and thus deprive other riparian owners of their use and service of the stream in its natural condition, unless such right is exercised under a valid prior appropriation. *Monroe Mill Co. v. Menzel*, 35 Wash. 487, 77 Pac. 813, 102 Am. St. 905, 70 L. R. A. 272.

Appellant purposes to release these waters in August or September, when they will be used to increase the natural flow of the Palouse river. Rock creek through respondents' lands can only accommodate about one hundred cubic feet of water, and to permit these waters to then be released and flood the creek above its summer level would mean an overflow of its waters upon respondents' lands when they were in crop, with its consequent damage. Appellant insists that it is only using waste waters, and that it has the right to use the so-called flood waters, citing *Edgar v. Stevenson*, 70 Cal. 286, 11 Pac. 704; *Modoc Land & Live Stock Co. v. Booth*, 102 Cal. 151, 36 Pac. 431, and *Fifield v. Spring Valley Waterworks*, 130 Cal. 552, 62 Pac. 1054—California cases, holding that a lower riparian owner who is not injured by the diversion of flood waters above his land cannot restrain such diversion. The reasoning of those cases is that the lower owner is only entitled to the natural flow of the stream; and so long as he continues to have such natural flow undiminished and his use of the water is not interfered with, he cannot complain, having suffered no damage. The water diverted in those

cases was during times of extraordinary flood or freshets, and was water never used by the lower owner. Nor was his use diminished or interfered with.

Where, however, as in this case, annual floods have caused streams to overflow from time immemorial, and such overflow has spread over lands, enriching and fertilizing them with its deposits, the California courts have invariably held that such waters were not subject to impounding by the upper owner, and that they were not extraordinary and unusual waters, within the meaning of *Edgar v. Stevenson* and like cases. In *Miller & Lux v. Madera Canal & Irr. Co.*, 155 Cal. 59, 99 Pac. 502, 22 L. R. A. (N. S.) 391, a case very similar to the one before us, it is said:

“There is no good reason for saying that the greatly increased flow following the annually recurring fall of rain and melting of snow in the region about the head of the stream is any less usual or ordinary than the much diminished flow which comes after the rains and the melted snows have run off.”

Again:

“It cannot be said that a flow of water, occurring as these waters are shown to occur, constitutes an extraordinary and unusual flow. In fact, their occurrence is usual and ordinary. It appears that they occur practically every year and are reasonably expected to do so, and an extraordinary condition of the seasons is presented when they do not occur; they are not waters gathered into the stream as the result of occasional and unusual freshets, but are waters which on account of climatic conditions prevailing in the region where the Fresno river has its source are usually expected to occur, and do occur.”

Gould on Waters, § 211, is cited, where it is said that:

“Ordinary rainfalls are such as are not unprecedented or extraordinary; and hence flood and freshets which habitually occur and recur again, though at irregular and infrequent intervals, are not extraordinary and unprecedented. It has been well said that ‘freshets are regarded as ordinary which

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are well known to occur in the stream occasionally through a period of years though at no regular intervals.' ”

To the same effect are: *California Pastoral etc. Co. v. Enterprise Canal & Land Co.*, 127 Fed. 741; *Heilbron v. Fowler Switch Canal Co.*, 75 Cal. 426, 17 Pac. 535, 7 Am. St. 183.

In this case the respondents do make use of these high waters, and the greatest use and benefit to their land comes from such use. Rock creek commences to rise in cold weather, and continues to rise gradually and very slowly, until the spring rains or a thaw increases its volume of water. It commences to overflow respondents' lands in January, and continues until late in March or April, when it gradually recedes, until about July it has left the lands. Respondents then commence their irrigation of the lands not overflowed, and irrigate in July, August, and September. So that they make a constant use of these waters from January to September. If the high waters of winter are impounded by appellant's dam, respondents will be deprived of a very material and beneficial use of these waters; in fact, their greatest and most beneficial use. They will be withheld from them in the early spring when required for the irrigation of their crops, and released in August and September when any overflow would be detrimental to their crops. This condition of Rock creek is not an extraordinary or unusual condition. It is a natural condition. With the exception of the fall months, the creek is either rising or falling, and we can see no reason why the use of the creek in its rise is not as much a use of its natural and ordinary condition as its use when its waters are receding. That respondents have this right to the overflow seems unquestioned, a right that is as clear as any riparian right can be.

“The right which a party has to the use of water flowing over his own land is undoubtedly identified with the realty, and is a real or corporeal hereditament.” *Cary v. Daniels*, 5 Met. (Mass.) 236.

It is next contended that the doctrine of riparian rights, except as to water for domestic purposes, has been entirely abrogated as to all lands through which nonnavigable streams flow, the title to which has been acquired from the government of the United States subsequent to the act of Congress, approved March 3, 1877 (19 Stats. at Large, 377), providing, among other things:

“And all surplus water over and above such actual appropriation and use, together with the water in all lakes, rivers, and other sources of water supply, upon the public lands and not navigable shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing right.”

This contention has been suggested by two Oregon cases, *Williams v. Altnow*, 51 Ore. 275, 95 Pac. 200, 97 Pac. 539, and *Hough v. Porter*, 51 Ore. 318, 95 Pac. 732, 98 Pac. 1083, 102 Pac. 728. The act itself manifestly relates only to the reclamation of desert lands and confines the use of the water to the amount “actually appropriated and necessarily used for the purpose of irrigation and reclamation;” such right to be determined by *bona fide* prior appropriation. As to such lands, Congress recognized and assented to the appropriation of water in contravention of the common-law right of the lower riparian owner to insist on the continuous flow of the stream. This court has always recognized the doctrine of prior appropriation of water on public lands as superior to all other claims, while it has also recognized the common-law right of the riparian owner against all but *bona fide* prior appropriators. *Benton v. Johncox*, 17 Wash. 277, 49 Pac. 495, 61 Am. St. 912, 39 L. R. A. 107; *Sander v. Wilson*, 34 Wash. 659, 76 Pac. 280. None of the lands now owned by respondents and riparian to Rock creek were settled upon or claimed as desert lands under the act of 1877. Nor does any right attach to such lands by virtue of such act. Neither can we find any valid and existing appropriation of this water by appellant or any grantor prior to the vesting

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of riparian rights in respondents in 1897; although several attempts to make a valid appropriation had been made prior to that time, under which appellant claims. These appropriations extend as far back as 1892, but it does not appear that the appropriators have employed such diligence in carrying out their irrigation projects as to keep their appropriation alive. Nor have they diligently and continuously prosecuted their scheme to completion, as provided in Rem. & Bal. Code, § 6318. The extent of their labors in this regard is found by the court below in its memorandum opinion:

“In 1892 surveys were made; in 1893 a dam was constructed and twelve miles of ditch dug; in the winter of 1893 part of the dam was taken out; in 1894 the company went into the hands of a receiver. The receivership lasted two years, during which time no extension was made of the work and the only work done was some effort to stop the decay of property. The extent of this effort is not shown. In 1897 another dam was built which went out the following winter. In 1898 they irrigated a tract of forty acres; in 1902 they irrigated twenty acres. From 1904 to 1906 no irrigation whatever. In 1897 part of the head works washed out, which were not replaced until 1907. In 1906 defendant Peters purchased the project, which was then unused and out of repair, and six months later transferred it to defendant company, which began construction, built a dam and head works, and has prosecuted its work with diligence and is now irrigating three hundred acres. This testimony establishes not an appropriation and continuous prosecution of the work of applying the water to a beneficial use, but three several appropriations: First, in 1893 an appropriation which was forfeited by the failure of the company and abandonment of the work; second, an appropriation and slight efforts toward the use of the water in 1897; third, an appropriation and considerable diligence by this defendant in 1907.”

These facts, justified by the record, amply sustain the court's holding that there was no valid and existing prior appropriation prior to the assertion of respondents' rights in 1897, in that it lacks the necessary element of an accompanying reasonable diligence in the prosecution of the work.

Offield v. Ish, 21 Wash. 277, 57 Pac. 809. Nor was the appropriation confirmed by the "continuous use of the water for irrigation thereafter, and the extension of the area of cultivation with reasonable diligence," as referred to in *Longmire v. Smith*, 26 Wash. 439, 67 Pac. 246, 58 L. R. A. 308.

"There must be diligence in prosecuting the construction work. This was a requisite from the earliest days for all appropriators claiming the benefit of the doctrine of relation, and remains to the present day wherever the law of appropriation is in force." Wiel, *Water Rights*, § 124.

It is true, as suggested by appellant, that enterprises of this character cannot be completed all at once, and that some element of time must elapse between its inception and its completion. There can, however, be such an exercise of diligent effort to complete the scheme, and such a use of water as to definitely indicate a purpose to continue its use, and to persevere to the final accomplishment of the project, such as is not shown by this record to have occurred between the appropriations of 1892 and 1893, and the condition of the project when this suit was instituted. The original appropriation in 1892 was to take 10,000 cubic feet of water per second. The next was for 5,000 cubic feet per second. And the extent of the use was the irrigation of forty acres in 1898. In 1902 the use had dropped to twenty acres, and from 1904 to 1906 no irrigation at all. Nor was there any attempt to repair the headgate, washed out in 1897, until 1907. We can find no diligence with such a record, and nothing that indicates anything other than an abandonment. If not an abandonment, it was certainly not such a continuous use as to amount to a *bona fide* appropriation against the rights of others, diligently and continuously used and asserted.

Concurring with the court below in its finding and conclusions, the judgment is affirmed.

CROW, ELLIS, and FULLERTON, JJ., concur.

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[No. 9492. Department Two. August 19, 1911.]

METROPOLITAN BUILDING COMPANY, *Appellant*, v. KING
COUNTY *et al.*, *Respondents*.¹

TAXATION—ASSESSMENT—EXCESSIVE VALUATION—LEASEHOLD—EVIDENCE—SUFFICIENCY. An assessed valuation of \$225,000 for a leasehold is excessive, and should be reduced to \$90,000, where it appears that the lessee's improvements cost nearly one and a half million, to meet which and other expenses, it has outstanding \$1,844,000 in bonds, that the improvements revert to the landlord on forfeiture of the lease, and that for two years the property had been operated at an increasing loss of \$30,000 and \$42,000 per year, and competent witnesses testified that the lease did not have any actual value at present and that its future value was speculative, depending upon the development of the city and neighborhood.

Appeal by plaintiff from a judgment of the superior court for King county, Gilliam, J., entered February 8, 1911, reducing an assessment on a leasehold, upon a review on certiorari of the proceedings of the board of equalization. Reversed.

Douglas, Lane & Douglas and *Kerr & McCord*, for appellant.

John F. Murphy and *Robert H. Evans*, for respondents.

CROW, J.—This cause in the issues and principles involved is similar to that of *Metropolitan Building Co. v. King County*, 62 Wash. 409, 113 Pac. 1114, between the same parties and upon the same leasehold. In the former action the assessed valuation for 1909 was under consideration, and the judgment of the superior court reducing it from \$480,000 to \$96,000 was affirmed. For the subsequent year of 1910, the county assessor placed an actual valuation of \$1,800,000 on the lease, and as other property was assessed at forty-five per cent of its true value, returned an assessed valuation of \$810,000. The building company in due season

¹Reported in 117 Pac. 495.

protested to the board of equalization, and by written petition demanded a reduction of the assessment to a valuation not exceeding forty-five per cent of \$200,000. After a hearing, the board dismissed the petition. Thereupon the building company applied to the superior court of King county for a writ of certiorari to review the proceedings of the board and county assessor. The superior court reduced the assessed valuation to \$225,000, the same being forty-five per cent of an actual valuation of \$500,000. The building company, feeling itself aggrieved in that the assessment is still excessive, has appealed.

The real estate covered by the lease is a tract of university land belonging to the state of Washington, equivalent in extent to about forty city lots, is located in an outlying business district of the city of Seattle, and as state property is exempt from taxation. This tract was leased by the university regents to one James A. Moore, for a term commencing February 1, 1907, and ending November 1, 1954. The lease, with the consent of the regents, was, in December, 1907, assigned to appellant, the Metropolitan Building Company. On February 1, 1907, practically all of the real estate was unimproved, was without streets, and stood from forty to fifty feet above adjoining official grades. The lease provides that the lessee shall pay rent quarterly in advance, at the following rates: From the date of the lease to November 1, 1912, \$15,000 per annum; for the succeeding ten-year period, \$40,000 per annum; for the next succeeding ten-year period, \$80,000 per annum; for the next succeeding ten-year period, \$100,000 per annum, and for the remaining twelve years of the term, \$140,000 per annum. It further requires the lessee to pay all assessments for regrading, street, and other special improvements, to erect certain business blocks of specified quality and value which shall immediately become the property of the state, and to perform other conditions which need not be here mentioned. Failure to pay the

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rent or to perform any other condition subjects the leasehold estate to forfeiture.

Appellant has paid large amounts for regrading and other nonproductive improvements, and at a total expenditure of \$1,465,212.48, has erected four permanent business blocks, now the property of the state. To meet these and other expenditures, it issued bonds in the total sum of \$1,844,000, which are now outstanding. It has been unable to rent all storerooms and offices in the business blocks, and for the past two years has been handling the property at a constantly increasing loss. If present conditions improve, it hopes to realize a profit from the lease; but if they do not improve, its enterprise will result in financial loss. It is asserted by appellant, and not disputed by respondents, that at the time the lease was originally executed, the lessor and lessee anticipated the property, which belongs to the state, would be exempt from taxation. It is now conceded that the lease is subject to taxation as personal property. Rem. & Bal. Code, § 9094.

The only question on this appeal is whether the lease has been properly assessed for the purpose of taxation. In *Metropolitan Building Co. v. King County*, *supra*, we said:

"The only question is, what is the proper basis for valuation. It is the contention of the appellants that the value of the property should be measured by the investment and the duration of the term; whereas, the respondent contends that the proper basis is the actual value in money of the leasehold interest. Const., art. 8, § 2. It has been heretofore held that a leasehold should be taxed as real property. *Moeller v. Gormley*, 44 Wash. 465, 87 Pac. 507. But the legislature has since provided otherwise. 'For the purposes of assessment and taxation all leases of real property and leasehold interests therein for a term less than the life of the holder, shall be and the same are hereby declared to be personal property.' Laws of 1907, p. 206, § 1 (Rem. & Bal. Code, § 9094). We are bound by the statute, therefore, to determine the value of the leasehold as personal property. In determining the worth of a leasehold the courts have uni-

versally held that it is the value of the term less the rent reserved. The value of the term is fixed with reference to present as well as prospective conditions; not speculative, but actual; or, to state the proposition more aptly, its value in money to one who desires to sell but who is under no necessity for selling, and to one who is desirous of buying but is under no compulsion to do so. . . . The fallacy of appellants' position may be readily shown by suggesting that, in the final years of the term, if their theory be followed, respondent would pay only a nominal tax, or be burdened by a tax so onerous as to amount to confiscation, for if the assessment be made with reference to the time the lease had yet to run, the assessed value would be out of all proportion to its value. If, on the other hand, respondent were compelled to pay upon the amount of its investment, the tax would be grossly excessive. Whereas, under the rule as we find it to be, the present worth of the lease from year to year, considering also the term, fixes a criterion of value easily ascertainable and just to both parties. Therefore, an assessment based upon the value of the improvements or the amount invested therein was erroneous, and entitles respondent to relief."

The evidence introduced before the board of equalization is a part of the record. Three prominent real estate men of many years' experience, whose competency has not been questioned were produced as witnesses on behalf of the appellant, and testified that, on March 1, 1910, the lease did not have any actual value; that its future value is speculative and uncertain, depending on further development of the city, further improvement in the neighborhood, and further advancement in rental value. One West, a prominent and experienced real estate dealer, produced as a witness on behalf of respondents, placed an actual valuation of \$800,000 on the lease, which at forty-five per cent would justify an assessed valuation of \$360,000. This witness, however, conceded that he was not thoroughly familiar with all the terms and conditions of the lease, and upon cross-examination testified as follows:

"Q. What do you think, Mr. West, the leasehold would be

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worth, taking into consideration its terms and conditions; taking into consideration the fact that more than \$1,800,000 has been invested; taking into consideration that for more than the last two years it has been operated by the Metropolitan Building Co. at a total loss, the first year of about \$30,000 and this year \$42,000? A. Well, if the expense account shows that is the actual loss, you could not sell it. Q. If the Metropolitan Building Company put this lease in your hands to sell, you would have to explain to the purchasers the terms and conditions of the lease. You would have to show to the purchasers the extent of the improvements and the cost of operation as long as the buildings had been operated. Now, taking into consideration the terms and conditions of the lease, the fact that during the last two years there has been a great deficit, do you think that this leasehold could be sold in the open market? . . . A. If the expense account shows such a deficit we would not sell it to any one . . . Q. You understand that the cost of the building is represented by bonds: That \$1,800,000 of bonds are outstanding against this property and have to be paid before the purchasers of the lease can get a dollar? For what would you be willing to put your money in and buy the lease? Mr. Vanderveer (attorney for respondents): The witness has testified that he would not buy the lease. Mr. Kerr (attorney for appellant): I want Mr. West's judgment. A. I have answered the question, that I would not be willing to at all if the buildings are operated at a loss. Q. Knowing these things as you do, what do you think the leasehold would bring in the open market if it was offered for sale? A. It would not sell under such a statement."

The undisputed evidence shows that the total income of the appellant for the year ending December 1, 1909, was \$141,446.53; that the carrying charges upon the property for the same period were \$174,580.93, leaving a net deficiency of \$30,134.40, not including taxes which, when adjusted, will increase the deficit, and that the appellant has expended for nonproductive improvements, such as grades, street assessments, etc., to March 1, 1910, the sum of \$148,000. In view of these facts, the evidence tends to show it to be at least problematical whether the lease had any

actual or salable value on March 1, 1910. While it is true that appellant has paid a considerable sum for the lease, has made valuable improvements, has issued bonds in the sum of \$1,844,000, and hopes to realize at some time in the future a profit on its investment, it indisputably appears that at the present time appellant is incurring a heavy loss which is constantly increasing, and that its entire enterprise may and probably will prove a financial failure unless growth of the city, improvement in the immediate locality, and material advancement in rental values cause the lease to appreciate in value. Should such an appreciation occur, an increased assessed valuation may be then legitimately imposed for the purposes of taxation. Appellant has expressed its willingness to submit to an assessed valuation of \$90,000. Upon the entire record, which we have carefully considered, we regard this offer as liberal and reasonable, and conclude that any greater valuation under existing conditions would be excessive and arbitrary.

The judgment is reversed, and the cause remanded with instructions to reduce the assessed valuation from \$225,000 to \$90,000.

DUNBAR, C. J., ELLIS, MORRIS, and CHADWICK, JJ., concur.

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Statement of Case.

[No. 9140. *En Banc*. August 19, 1911.]

THE STATE OF WASHINGTON, *on the Relation of Wallace A.
Bussell et al., Appellant, v. DAN R. ABRAHAM et al.,
Respondents.*¹

APPEAL—DECISION—REHEARING—QUESTIONS DETERMINED. After declaring a law unconstitutional, the supreme court, may, on rehearing, consider the effect of a retroactive statute, enacted to cure the defects prior to the entry of final judgment, to the same extent as if it had been enforced on the first hearing.

WATERS AND WATER COURSES—WATERWAY DISTRICTS—ORGANIZATION. The fact that a commercial waterway district is in court contending for the validity of a judgment declaring in its favor, is sufficient evidence that it is maintaining its existence and entitled to the benefits of curative acts passed since the institution of the suit.

SAME—STATUTES—CURATIVE AND RETROACTIVE LAWS—CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT. The commercial waterway district law (Rem. & Bal. Code, § 8166 *et seq.*) having been declared unconstitutional because of its failure to provide lawful means for levying the assessments authorized, it was competent for the legislature by retroactive acts (Laws 1911, pp. 10-46), to legalize and validate attempted organizations and all district indebtedness under the old law, except assessments, and to add provisions curing defects in the old law by virtue of which lawful assessments could thereafter be made; since it does not impair the obligation of a contract.

STATUTES—CURATIVE ACTS—RETROACTIVE OPERATIONS—PENDING CASES. Curative statutes which do not impair the obligation of contracts and are intended to be retroactive, are applicable to pending cases, and will be considered by the supreme court, on petition for rehearing, although enacted after the filing of a decision.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered June 15, 1910, affirming an order made by a board of county commissioners establishing a commercial waterway district, after a hearing before the court. Affirmed.

¹Reported in 117 Pac. 501.

Robert A. Devers, for appellant.

John F. Murphy, Shorrett, McLaren & Shorrett, and
Bausman & Kelleher, for respondents.

ON REHEARING.

CROW, J.—On January 12, 1911, we filed an opinion in this action (61 Wash. 601, 112 Pac. 671), by which we ordered a reversal of the judgment of the superior court in and for King county. In stating the case we then said:

“The legislature of the state of Washington, at the specially convened session of 1909, passed an act intended to provide for the construction and maintenance of commercial waterways. Laws Special Session, 1909, page 8; Rem. & Bal. Code, § 8166 *et seq.* Acting in accordance with the provisions of the act, certain citizens of the county of King petitioned the board of county commissioners of that county to establish a commercial waterway district therein, comprised of territory specifically described in the petition. The board of county commissioners assumed jurisdiction of the petition, and thereafter, upon due procedure being had as contemplated by the statute, entered an order purporting to create a commercial waterway district. The relators own property included within the boundaries of the proposed district, and appeared before the board of county commissioners and opposed the creation of the district, alleging as grounds therefor, among others, that the act under which the proceedings were being had were in violation of both the state and Federal constitutions. Their objections were overruled, whereupon after the establishment of the district, they sued out a writ of review from the superior court of King county, seeking to review the order of the board. The superior court, on a hearing had hereon, affirmed the order creating the district, and dismissed the writ. This appeal was taken therefrom.”

The question before us was the validity of the proceedings of the board of county commissioners, the organization of the commercial waterway district, and the constitutionality of the act of 1909, under which the district had been created. Many objections were presented and argued in the briefs, but on consideration of the entire act and the proceedings had there-

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under we found but one reason for declaring the act invalid. We further said:

"While many objections are urged in this court against the statute and the proceedings had thereunder, we have found it necessary to consider only the constitutional question here suggested, as we deem it fatal to the proceedings. The law plainly contemplates that the expense of constructing the commercial waterway for which the district is organized shall be provided for by an assessment upon the real property situated in the waterway district benefited by the improvement, yet no person, board, or other authority is authorized by the act to make the assessment. Nor does the act contain any direct provision for making an assessment roll, nor any provision for its equalization when made, at which the property holder may be heard as to the amount that may be charged against his property. Since no other means of raising the necessary cost of making the improvement is contemplated than by an assessment, we think that the assessment is so far an integral part of the act that the omission to make it effective renders the whole act void. *Skagit County v. Stiles*, 10 Wash. 388, 39 Pac. 116; *Snohomish County v. Hayward*, 11 Wash. 429, 39 Pac. 652; *Franklin Sav. Bank v. Moran*, 19 Wash. 200, 52 Pac. 858."

Before the thirty-day period had expired within which a petition for rehearing might be filed and while the cause was still pending in this court, the legislature passed two acts, chapters 10 and 11, Laws 1911, affecting the subject-matter here involved. Chapter 10, p. 10, Laws 1911, a curative and validating act, contained an emergency clause, and was approved by the governor February 8, 1911. Section 1 reads as follows:

"The organization, establishment and creation of all commercial waterway districts in this state heretofore had, or made, or attempted under the provisions of chapter 8 of the Laws of the Extraordinary Session of 1909, approved August 17th, 1909, entitled . . . under which attempted organization, establishment or creation, an organized district has been maintained since the date of such attempted organization, establishment or creation is hereby for all purposes declared legal and valid, and such commercial waterway districts are

hereby declared duly organized, established and created. And all debts, contracts and obligations heretofore made or incurred by or in favor of any such commercial waterway district so attempted to be organized, established and created, and all official bonds or other obligations executed in connection with or in pursuance of such attempted organization, are hereby declared legal and valid and of full force and effect: Provided, That nothing herein shall be construed to legalize or validate any attempted assessment or condemnation which may have been had or initiated by such district prior to the passage of this act."

Chapter 11, pages 11 to 46, inclusive, Laws 1911, having an emergency clause, was approved February 9, 1911, and is an extensive statute which reenacts the old law of 1909, with added provisions sufficient to cure the defects found by this court, and mentioned in our former opinion. Section 49 of this act also provides for the validation of existing commercial waterway districts organized or attempted to be organized under the act of 1909. These curative and validating statutes were in effect before the thirty-day period had expired within which a petition for rehearing could be filed. Such a petition was filed, calling our attention to them, and a rehearing was granted. Upon the reargument, additional briefs and argument have been presented.

Appellants, in substance, contend that no original question is before us for rehearing; that respondents in effect present only the new questions, whether the commercial waterway district has been validated, whether it is now a legal organization, and whether for that reason the judgment of the superior court should be affirmed. Although appellants raise some constitutional questions as to the validity of the acts of 1911, we find their objections to be without merit, and conclude that the controlling question before us is whether we can, on this rehearing, consider the acts of 1911, and whether they have validated the attempted organization of the commercial waterway district here involved.

Appellants contend the only purpose of a rehearing is to

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correct a decision erroneous in regard to matters theretofore considered, and not to raise new issues under new pleadings. New pleadings are not presented on this rehearing. The identical proceedings and records considered on the original hearing are still before us without modification or change. Before final judgment has been entered in this court, the cause not having passed from our jurisdiction, we are called upon to consider the effect of new statutes, which the respondents contend are applicable and now require an affirmance of the judgment of the superior court. Counsel for appellants, citing *State ex rel. Burke v. Board of County Com'rs*, 61 Wash. 684, 112 Pac. 929, contend this court will not consider a statute passed subsequent to the date of the filing of the original opinion. In the case cited we refused to consider the act of Congress mentioned, for the reasons that final judgment had been entered by this court; that the cause had been remitted to the superior court; and that we had lost our appellate jurisdiction, which could not be restored on the same appeal by stipulation. This cause is still before us on the original appeal, for consideration on the rehearing granted upon a petition seasonably filed. Our appellate jurisdiction has at no time ceased or been disturbed. The original question, whether the judgment of the superior court shall be affirmed, is before us as fully and completely as though no opinion had heretofore been filed, and it is our duty to consider statutes now in force to the same effect and extent we would consider them were this the first hearing.

An examination of the 1911 acts will show them to be curative statutes, intended to be retroactive for the direct purpose of validating the organization, establishment, and creation of all commercial waterway districts in this state heretofore had, or made, or attempted, under the act of 1909, where such attempted organization has been since maintained. The acts, by reason of their remedial and retroactive features, are applicable to the commercial waterway district here involved. Appellants, however, contend that we cannot apply the acts

in this cause, as it has not been made to appear that the district here involved is still maintained. The record before us shows that its organization, attempted under the act of 1909, was approved by the judgment of the superior court, and that the district is now in this court contending for the validity of such judgment, thereby maintaining its own organization and existence. The evidence of this record we regard as sufficient to justify the conclusion that the district is being maintained to such an extent at least as will entitle it to now claim all benefits of the curative acts in this action and on this appeal.

The legislature has power to enact a curative or validating statute retroactive in its application, as long as it does not thereby impair the obligation of contract or otherwise violate any constitutional inhibition. There can be no question but that the legislature, if it saw fit, might have originally authorized the creation of a commercial waterway district, by the exact procedure that has been adopted in this particular instance.

“A retrospective statute curing defects in legal proceedings where they are in their nature irregularities only, and do not extend to matters of jurisdiction, is not void on constitutional grounds, unless expressly forbidden. Of this class are the statutes to cure irregularities in the assessment of property for taxation and the levy of taxes thereon; irregularities in the organization or elections of corporations; irregularities in the votes or other action by municipal corporations, or the like, where a statutory power has failed of due and regular execution through the carelessness of officers, or other cause; irregular proceedings in courts, etc. The rule applicable to cases of this description is substantially the following: If the thing wanting or which failed to be done, and which constitutes the defect in the proceedings, is something the necessity for which the legislature might have dispensed with by prior statute, then it is not beyond the power of the legislature to dispense with it by subsequent statute. And if the irregularity consists in doing some act, or in the mode or manner of doing some act, which the legislature might have made immaterial by prior law, it is equally competent to make

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the same immaterial by a subsequent law." Cooley, Const. Lim. (6th ed.), pp. 456-7.

The 1911 statutes are sufficiently potent to accomplish their evident purpose. They expressly cure and validate defective districts, begun or attempted to be organized under the act of 1909. Chapter 10, p. 10, Laws 1911, is manifestly modeled after the curative act (Laws 1893, p. 183) relating to cities and towns, which this court held to be constitutional and effective, in *Pullman v. Hungate*, 8 Wash. 519, 36 Pac. 483. See, also, *State ex rel. Hamen v. Ballard*, 16 Wash. 418, 47 Pac. 970; *Lewis County v. Gordon*, 20 Wash. 80, 54 Pac. 779; *Spring Water Co. v. Monroe*, 55 Wash. 195, 104 Pac. 202; *Stembel v. Bell*, 161 Ind. 323, 68 N. E. 589; *Muse v. Lexington*, 110 Tenn. 655, 76 S. W. 481; *McMickle v. Hardin*, 25 Tex. Civ. App. 222, 61 S. W. 322; *Cole v. Dorr*, 80 Kan. 251, 101 Pac. 1016, 22 L. R. A. (N. S.) 534.

Can these statutes then be considered on this appeal taken prior to their enactment? By reason of their emergency clauses, they became effective before the petition for rehearing was filed. Judge Cooley, in the 6th edition of his work on Constitutional Limitations, at page 468, further says:

"Nor is it important . . . that the legislative act which cures the irregularity, defect, or want of original authority, was passed after suit brought, in which such irregularity or defect became a matter of importance. The bringing of suit vests in a party no right to a particular decision; and his case must be determined on the law as it stands, not when the suit was brought, but when the judgment is rendered. . . And if a case is appealed, and pending the appeal the law is changed, the appellate court must dispose of the case under the law in force when their decision is rendered"

See, also, *Ettor v. Tacoma*, 57 Wash. 50, 106 Pac. 478, 107 Pac. 1061.

The rule is well established that curative statutes, intended to be retroactive in their effect, and which do not impair the obligation of contract, are applicable not only to transactions to which they are intended to relate, but also to cases pending

in trial courts, or pending upon appeal in appellate courts. 36 Cyc. 1222; *Green v. Abraham*, 43 Ark. 420; *State, Bonney v. Collector of Bridgewater*, 31 N. J. L. 133; *Bleakney v. Farmers & Mechanics' Bank*, 17 Serg. & R. 64, 17 Am. Dec. 635; *Sidway v. Lawson*, 58 Ark. 117, 23 S. W. 648; *Pelt v. Payne* (Ark.), 30 S. W. 426; *State v. Norwood*, 12 Md. 195.

In *Pelt v. Payne*, *supra*, the court said:

"It is true that courts do not usually give statutes a retroactive effect, and it is the general rule that the soundness of a decree must be tested by the law in force at the time of its rendition, but this is not so in all cases, for 'when the language of the statute clearly indicates an intention that it shall have a retroactive effect it must be so applied.' *State v. Norwood*, 12 Md. 206. 'It is, in general, true,' said Chief Justice Marshall in the case of *U. S. v. The Peggy*, 'that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes, and positively changes the rule which governs, the law must be obeyed or its obligation denied. If the law is constitutional, . . . I know of no court which can contest its obligation.' *U. S. v. The Peggy*, 1 Cranch, 109. That case was decided in 1801, and the rule of law thus announced has been frequently followed."

The only defects in the statute of 1909, upon which our former opinion was based, have been cured by subsequent legislation, and the curative provision of the acts of 1911 being sufficient to validate the commercial waterway district here involved, we conclude that the judgment of the superior court should be now affirmed. It is so ordered. No costs will be awarded to either party on this appeal.

DUNBAR, C. J., MOUNT, MORRIS, ELLIS, FULLERTON, CHADWICK, and GOSE, JJ., concur.

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Statement of Case.

[No. 9341. Department One. August 23, 1911.]

INTERSTATE ENGINEERING COMPANY, *Appellant*, v. JOHN
F. ARCHER *et al.*, *Respondents*.¹

SALES—BREACH—DELIVERY — DAMAGES FOR DELAY. Damages by reason of delay in delivering iron sold for the construction of a certain bridge are reasonably within the contemplation of the parties and recoverable, where the seller agreed to ship the iron within thirty days, and knew that certain false work was necessary, which flood stages of the river would sweep away if the bridge was not promptly completed, and the seller failed to furnish the steel for six months, at which time the false work had been swept away.

EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY—INCOMPLETE WRITINGS. Where a letter acknowledges receipt of an order for structural iron, and states the price, kind of material, manner of shipment, and terms of payment, but does not state the quantity of material or when it is to be delivered, the whole contract is not stated, and oral evidence as to the time when the iron was agreed to be delivered is admissible.

EVIDENCE—PRODUCTION OF DOCUMENTS—SUBPOENA DUCES TECUM. A subpoena *duces tecum* requiring the plaintiff and its attorneys to produce all letters and telegrams passing between it and certain agents respecting the sale of the goods in suit, is sufficiently particular to empower the court to compel plaintiff's attorneys, to whom letters were delivered, to produce them.

APPEAL — REVIEW — ESTOPPEL — INVITED ERROR. It cannot be claimed that the trial court's threat of punishment for contempt for refusal to produce papers prejudiced the jury, where the party refused to obey the order of the court in the presence of the jury and did not ask that the jury be excused when inviting the controversy.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered July 6, 1910, upon the verdict of a jury rendered in favor of the defendants, in an action on contract. Affirmed.

Poindexter & Moore and *Richard G. Hutchinson* (O. C. Moore, of counsel), for appellant.

Danson & Williams, for respondents.

¹Reported in 117 Pac. 470.

MOUNT, J.—The plaintiff brought this action to recover an alleged balance of \$1,048.18, on account of structural iron and steel furnished to defendants upon their order. The complaint alleged that on December 7, 1908, defendants entered into a written agreement for the purchase of iron and steel, as follows:

“Spokane, Wash., December 7, 1908.

“John F. Archer & Co.,

“City.

“Gentlemen: We are entering your order today, subject to the approval of the Interstate Engineering Co. of Cleveland, Ohio, for the steel material for the highway bridge at Kamiah, Idaho. This material to be furnished you at a price of \$4.33 per hundred f. o. b. Kamiah, Idaho, same to be fabricated and ready for erection, according to B-P's and according to specifications of the American Bridge Co. for light 'C' type of highway bridge. The price quoted is determined as follows: \$3.00 per hundred for the fabricated steel material f. o. b. Bedford, Ohio, and \$1.33 per hundred freight from Bedford to Kamiah, Idaho. There shall be furnished with this fabricated material enough take-up bolts and rivets for erection in the field. There shall not be a variation in weights between the shop weights of the Interstate Engineering Co. and the weights of the Railroad Company of over 2%. Any variation in freight rate at the time of shipment shall be assumed by consignee. All material to be shipped in full carloads so that same will be figured at carload rates. Terms of payment to be as follows: draft for 80% of the contract price to be made on John F. Archer & Co. through the Spokane and Eastern Trust Co. of Spokane, attached to bill-lading; balance to be in two equal payments of 30 and 60 days each. We are sending you, under separate cover, corrected copy of B-P which you will use in connection with the specifications of the American Bridge Co. for this work.

“Yours very truly,

“Accepted Dec. 7, 08. Wright & Bell, By A. L. Wright.

“John F. Archer & Co.;”

that in accordance with this contract, plaintiff delivered to defendants 174,698 pounds of steel and iron, which defend-

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ants accepted and received; that the total price was \$5,240.94, of which defendants paid \$4,192.76, leaving a balance due of \$1,048.18.

The answer of the defendants admitted that they entered into a contract with the plaintiff prior to the date of the letter above set out, and that the letter was delivered to them on the date it bears; that plaintiff furnished 140,000 pounds of steel and iron for the construction of the bridge referred to; and that defendants paid plaintiff \$4,192.76; but denied all the other allegations of the complaint.

And as an affirmative answer and counterclaim, defendants alleged that, on October 7, 1908, they had a contract to construct a bridge across the Clearwater river at Kamiah, Idaho, and plaintiff, knowing that fact, solicited an order from defendants for the iron and steel necessary to construct the said bridge; that defendants and plaintiff, on November 1, 1908, entered into such contract, whereby plaintiff agreed, for the price of three cents per pound, to furnish all the iron and steel bolts and rivets for said bridge, all of such material to be shipped by plaintiff to defendants at Kamiah, Idaho; and that the plaintiff agreed to ship said material within a reasonable time, and not to exceed thirty days after the date of the contract; that plaintiff knew that defendants were engaged in constructing said bridge, and that the iron and steel would be required within six weeks from the date of the contract, and that, unless the material was delivered within said time, defendants would have to suspend work on such bridge; that plaintiff also knew that certain false work was necessary in the bed of the river preparatory to receiving the steel, and that the river reached flood stages in the months of February, March, April, and May of each year, and that unless such iron and steel reached it in time to be put in place before high water, such false work would be carried away and defendants would suffer great loss thereby; that a reasonable time for shipping said steel did not exceed three weeks from the date of the agreement, and that if plain-

tiff had shipped said material within a reasonable time, or within thirty days as it agreed, the bridge would have been completed before high water; that in making the contract, defendants relied wholly upon the promise of the plaintiff to ship said materials within a reasonable time, and not to exceed thirty days; that plaintiff delayed and refused to ship such materials within a reasonable time or within thirty days, and defendants repeatedly urged plaintiff to carry out its contract, and plaintiff promised to do so; but, notwithstanding such promises, failed to ship any of such material until June 29, 1909, when a portion thereof was shipped, and the remainder was shipped several weeks later; that by reason of such delay, the false work placed in the river by defendants was washed away by the flood waters and lost, to defendants' damage in the sum of \$4,184.45; that the flood water which caused the damage did not occur until after the defendants could have completed said bridge, if plaintiff had complied with its agreement and furnished said materials within a reasonable time.

The plaintiff demurred to the affirmative matter and cross-complaint, which demurrer was overruled. Plaintiff then filed a reply, denying the new matter set up. Upon these issues, the cause was tried by the court and a jury. A verdict was returned in favor of the defendants for \$1,500. After a motion for a new trial was denied, a judgment was entered upon the verdict. Plaintiff has appealed.

It is argued that the court erred in not sustaining the demurrer to the affirmative defense, for the reason that the damages therein alleged were not such as the parties might reasonably have had in contemplation at the time the contract was made. We are of the opinion that the allegation of the answer brings the case within that rule. It is alleged, that the plaintiff knew that the materials were to be used in this particular bridge; that certain false work was necessary preparatory to receiving the iron and steel; that the river reached flood stages at a certain time, and that un-

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less the materials agreed to be furnished were put in place before that time, the false work would be carried away. In view of these facts and with notice of them, it is alleged that the plaintiff agreed to deliver the materials within thirty days. They were not so delivered within that time, and afterwards promises were repeatedly made to ship them. It is apparent that the contract was made and the time fixed for delivery in order to avoid such damages, and that such damages were, we think, in the contemplation of the parties. In the trial of the case the evidence was ample to show that, before making the contract, the defendants discussed the whole situation with the agents of the plaintiff, and that the parties understood that it was necessary to have the iron and steel within a given time or loss would occur. In view of this fact, it was stated that the materials would be shipped at once and delivered within a reasonable time, and not to exceed thirty days. The court did not err, therefore, in overruling the demurrer, or in receiving evidence of damages, occasioned by floods occurring after the expiration of thirty days.

Appellant also argues that the court erred in admitting oral evidence as to the agreement entered into between plaintiff's agent and the defendants. Evidence was admitted to the effect that the material was to be delivered within a reasonable time, which should not exceed thirty days. It is argued by the appellant that the writing above set out is the final word as to the terms of the agreement, and the testimony fixing the time of delivery of the material is not admissible because it varies the terms of the written agreement. It is elementary that the terms of a written contract may not be varied or contradicted by parol. It is conceded in this case that this letter was written by Wright & Bell, local agents in Spokane for the plaintiff, and that the letter was indorsed and accepted by the defendants after the time when the agreement was made authorizing plaintiff to furnish the materials. Defendants also concede that the letter correctly

states the terms of the agreement upon the matters referred to therein. But defendants insist that the original agreement was oral, and that the terms thereof may be proven by parol.

The letter upon its face does not purport to state the whole agreement. It is in the form of a letter from the plaintiff's agent at Spokane, and is addressed to the defendants at the same place. It states: "We are entering your order today subject to the approval of the Interstate Engineering Company of Cleveland, Ohio, for the sale of material for the highway bridge at Kamiah, Idaho." It then states the price, kind of material, manner of shipment, and terms of payment, but it does not state the quantity of material, or when it is to be shipped or delivered. These terms, it would seem, would be necessary to a completed contract. It is plain that an order had been previously given to these agents for the material. This order is as much a part of the contract as the letter quoted. When the defendants received the letter and indorsed their acceptance thereon, they thereby agreed to the terms of the contract as expressed in the letter and were bound thereby. They could not thereafter be heard to orally dispute or vary any of the terms therein stated. But it does not appear upon the face of the letter that it purports to contain the whole contract. Where it appears that only a part of the contract is in writing, the part not in writing may be proved by parol, in so far as it is not inconsistent with the written portion. 17 Cyc. 746-7; Wigmore, Evidence, § 2430. It was proper, therefore, for the court to receive oral evidence as to the time when the materials were agreed to be delivered. It follows that the defendants might show the damages which naturally followed from such delay, when it was proven that plaintiff agreed to furnish the materials within the specified time, with notice and knowledge of the conditions and the purposes for which the materials were ordered.

Appellant argues that the court erred in requiring it to

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produce certain letters and telegrams at the trial. It appears that, prior to the trial, defendants caused a subpoena *duces tecum* to be served upon the plaintiff and its attorneys, which subpoena required the plaintiff and its attorneys to produce on the trial "all letters and telegrams and copies of letters and telegrams passing between Wright & Bell, or either member of said firm, and the Interstate Engineering Company, or either member of said firm, and the Interstate Engineering Company or any of its officers, concerning the furnishing of steel to the defendants." Certain letters and telegrams relating to the contract were turned over by plaintiff to its attorneys and by them brought into court. But counsel for plaintiff refused to deliver these letters and telegrams. The court thereupon required counsel, under threat of punishment for contempt, to deliver the letters and telegrams, and they were put in evidence.

Appellant argues, that the subpoena was too general in its terms to require the production of any particular letter or telegram; that the letters were in possession of counsel, having been delivered by the plaintiff, and were therefore privileged; also that the controversy, occurring in the presence of the jury, was prejudicial to the plaintiff. There is no merit in these contentions. The subpoena was particular enough so that it was readily understood what documents were wanted, and these documents were actually brought into court. Being there and material to the case, the court certainly had power to require them to be produced and, if necessary, punish counsel for refusal to obey such order. This position seems too plain to justify further discussion. If the position of counsel in refusing to surrender the documents was prejudicial before the jury, he may not now complain, because he invited the threat of the court in the presence and hearing of the jury. He did not ask the court to withdraw the jury while the matter was being discussed, when he must have known that some controversy would arise

upon his refusal to surrender the papers. There was no error in the court's rulings upon this question.

The appellant insists, lastly, that the steel was furnished within the time agreed upon. This was a question for the jury, and evidently was decided adversely to plaintiff.

We find no error in the record, and the judgment is therefore affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 9381. Department One. August 23, 1911.]

C. R. PETREE *et al.*, *Appellants*, v. WASHINGTON WATER
POWER COMPANY, *Respondent*.¹

LIMITATION OF ACTIONS — COMMENCEMENT OF ACTIONS — FILING COMPLAINT. An action is barred by the statute of limitations, where the complaint was duly served but was not filed, so as to commence the action within the time limited, under Rem. & Bal. Code, § 167, providing that the action is not commenced so as to toll the statute, until the complaint is filed.

LIMITATION OF ACTIONS—PLEADING—SUPPLEMENTAL PLEADINGS—DEMURRER AFTER ANSWER. Under Rem. & Bal. Code, § 308, authorizing supplemental pleadings to show facts occurring after issue joined, it is proper to allow defendant to withdraw an answer and demur on the ground that the complaint was not filed within time to toll the statute of limitations, where the objection was not available at the time the issue was made up.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered April 16, 1910, upon sustaining a demurrer to the complaint, dismissing an action for personal injuries. Affirmed.

H. N. Martin, H. P. Knight, Poindexter & Moore, and Richard G. Hutchinson, for appellants.

L. F. Chester and Post, Avery & Higgins, for respondent.

¹Reported in 117 Pac. 475.

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MOUNT, J.—The lower court sustained a demurrer to the complaint in this action, upon the ground that the action was barred by lapse of time under the statute, and dismissed the action. Plaintiffs have appealed.

The action was for personal injuries which the plaintiff Emma Petree received on December 10, 1906. The summons and complaint were served upon defendant on September 9, 1909. The complaint was not filed until April 7, 1910. After service of the summons and complaint but before the complaint was filed, the defendant appeared and demurred generally to the complaint, and moved for and obtained an order for the physical examination of the said plaintiff, and when the demurrer was overruled, served its answer to the complaint. The issues were finally made up. The question of the statute of limitations had not been raised. When the cause was called for trial, it was discovered that the complaint had not been filed until after the three-year statute of limitations had run. The court thereupon permitted the defendant to withdraw its answer, and to file a demurrer upon the ground that the action was barred. This court has held that, under our statute, Bal. Code, § 4807 (Rem. & Bal. Code, § 167):

“An action is not deemed commenced so as to toll the statute of limitations until the complaint is filed, though it may be deemed commenced for other purposes by the service of summons and complaint.” *Blalock v. Condon*, 51 Wash. 604, 99 Pac. 733.

The action was clearly barred under the rule there stated.

The appellants argue that the court erred in allowing defendant to withdraw its answer and file a demurrer after the cause was called for trial. At the time the issues were made up, the plaintiffs' complaint had not been filed. The defendant did not know that the plaintiffs would not file the complaint in time. It assumed, of course, that the plaintiffs would prosecute the action diligently. Plaintiffs did not do so. Yet after the issues were made up and after the statute had run,

the complaint was filed. This fact did not appear when the first demurrer was passed upon, or when the first answer was filed. The statute provides at § 308, Rem. & Bal. Code, that the court may allow supplemental pleadings showing facts which occurred after the former pleadings were filed. The court was authorized under this section to permit either the demurrer or special plea to be filed. In *Blalock v. Condon, supra*, we said: "The court clearly acted within its discretion in permitting a renewal of the demurrer after answer."

The judgment is affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

[No. 9496. Department One. August 23, 1911.]

SHOSHONE CONCENTRATING COMPANY, *Respondent*, v.
HAMBURG-BREMEN FIRE INSURANCE COMPANY,
Appellant.¹

INSURANCE—FIRE INSURANCE—FORFEITURE—WATCHMAN—BREACH OF WARRANTY. A policy of fire insurance on a reconcentrating plant warranting that whenever the plant is idle, competent watchmen shall be employed and due diligence used to keep a continuous watch day and night in and immediately around certain parts of the plant, is violated and the policy forfeited, where, on shutting down, the insured employed the day and night foreman of a mill situated six to twelve hundred feet distant, paying each one dollar a day for watching intermittently while not engaged in their regular duties as foreman for which they received \$5.50 per day from the other mill, and it appears that the night watchman at the time of the fire had no key and had never been in or near the premises.

Appeal from a judgment of the superior court for Spokane county, Huneke, J., entered December 20, 1910, upon the verdict of a jury rendered in favor of the plaintiff, in an action on a policy of fire insurance. Reversed.

¹Reported in 117 Pac. 500.

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Goodfellow, Eells & Orrick and Happy, Winfree & Hindman, for appellant.

Belden & Losey, for respondent.

MOUNT, J.—The plaintiff brought this action to recover upon a fire insurance policy. The case was tried to the court and a jury. At the close of plaintiff's evidence, the defendant moved for a nonsuit, and again at the close of all the evidence defendant moved the court for a directed verdict, upon the ground that the evidence failed to show a compliance with the terms of the policy. These motions were denied. The jury returned a verdict in favor of the plaintiff, and the judgment followed. The defendant has appealed.

The following facts are not disputed in the case: On November 28, 1908, the defendant issued to the plaintiff an insurance policy for \$2,000, on a reconcentrating plant owned by the plaintiff near the town of Sweeney, Idaho. The policy contained a clause as follows:

"It is warranted by the assured that, whenever any of the following named parts of the plant described in this policy, to wit: Concentrator or re-treating plant and machinery therein, are idle or not in operation for any cause whatever, competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately around said parts of the plant. If any of the above named parts are idle or not in operation for a period of more than thirty days without the written consent of this company, this policy shall be void."

At the time the policy was issued, the mill plant was in operation. On December 12, 1908, the mill was closed down, and defendant's agent informed the plaintiff that it would be necessary to obtain day and night watchmen. The plaintiff employed two watchmen, being the day and night foremen for the Shoshone Concentrating Company, a mill in operation located from six hundred to twelve hundred feet distant from the plaintiff's mill. It was agreed between the plaintiff company and these two men that the latter should attend to their

duties as foremen in the Shoshone company's mill, and while on duty there watch the idle plant of the plaintiff as their duties would permit. It appears that they were not constantly employed, and that their duties called them out to the dump of the Shoshone mill about every hour, and that while there they were in view of plaintiff's mill and about six hundred to eight hundred feet away. The watchman on day duty was given the keys to the plaintiff's mill, and went down there about four times per week and examined the mill to see that it was all right, that water was kept in barrels on each floor, and that buckets were handy thereto. The night watchman never had a key. One of them went within about one hundred and forty feet of the plaintiff's mill, upon several occasions. The last one, however, on night duty had never been in or about the mill, and had never had a key thereto. The mill was destroyed by fire on May 1, 1909, about ten o'clock at night, while it was idle. No one was about the premises at the time of the fire. The night watchman was attending to his duties in the Shoshone mill when he heard of the fire. At that time the fire was beyond control. At the time the plaintiff employed these men, plaintiff's officers knew the duties of the men in the Shoshone mill, and also knew their opportunities for watching the plaintiff's mill and what time thereafter they gave to it. Plaintiff agreed to pay them one dollar per day each for watching the mill. They received \$5.50 per day each for their time in the Shoshone mill.

It is apparent that the plaintiff did not comply with the provisions of the policy above quoted. The policy provides that, whenever the plant is idle, "competent watchmen shall be employed and due diligence used to keep a continuous watch both day and night in and immediately around said parts of the plant." Competent men were no doubt employed, but it was understood between them and the plaintiff that they were not to keep a continuous watch both day and night in and immediately around the plant, but that they were to watch intermittently at a distance from the premises,

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estimated at from six hundred to twelve hundred feet therefrom. The apparent object of the plaintiff was to evade its duties under the policy by making a show of compliance therewith. The diligence exercised was to evade, and not to comply with, the terms of the policy. We think the evidence shows that the men employed were competent watchmen, and that if they had been employed to keep a "continuous watch . . . in and immediately around" the premises, the property would not have been destroyed. But they were not so employed, and they did not so watch the property. The effect of the testimony of the officers of the plaintiff company was that the men were merely employed to keep an occasional watch from a distance, which they did, and which was the opposite of the duties required by the appellant. This breach of duty avoided the policy. *McKenzie v. Scottish Union & Nat. Ins. Co.*, 112 Cal. 548, 44 Pac. 922, and cases there cited. This was decisive of the case. There was no question of fact for the jury to pass upon, and the court erred in not granting the defendant's motions.

The judgment is therefore reversed, and the cause ordered dismissed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

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[No. 9569. Department One. August 23, 1911.]

J. H. SMITH *et al.*, *Appellants*, v. FLATHEAD RIVER COAL COMPANY, *Respondent*.¹

CORPORATIONS—STOCK—CONTRACTS—SPECIFIC PERFORMANCE. There can be no specific performance of a contract made by a stockholder for the issuance of corporate stock to him in exchange for property where the corporation had no unissued stock and was not authorized to issue any more.

Appeal from a judgment of the superior court for Spokane county, Sullivan, J., entered October 29, 1910, upon granting a nonsuit in an action for specific performance. Affirmed.

John M. Gleeson and Joseph F. Morton, for appellants.
Skuse & Morrill, for respondent.

MOUNT, J.—This action was brought to enforce specific performance of a contract. When the plaintiffs had introduced their evidence, the court dismissed their action. Plaintiffs have appealed.

It appears that the plaintiff J. H. Smith and the defendant company entered into the following contract:

“This agreement, made this the 7th day of April, 1908, by and between J. H. Smith, party of the first part, and the Flathead River Coal Company, party of the second part, witnesseth: That the party of the first part agrees to have surveyed and obtain a lease on one certain coal and petroleum claim situated in the southeast Kootenay, B. C., covered by Mining License No. 229, and its renewal in the name of Hattie L. Smith, and assign the said lease unto the Flathead River Coal Company, and accept therefor such number of shares of the capital stock in payment as shall have been issued to the original stockholders of said company in proportion to the number of acres involved. And the said party of the second part herein agrees that they will issue the above

¹Reported in 117 Pac. 475.

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mentioned number of shares of the capital stock of said company in payment of such assignment when it shall have been made.”

Thereafter the plaintiffs procured the lease mentioned, and tendered the same to defendant, and demanded the stock—about 44,000 shares—which defendant refused to issue. It also appeared that the plaintiffs with others had organized the defendant corporation some time before the date of the contract, and were stockholders therein and knew that all the stock of the corporation had been subscribed and issued by the corporation to its stockholders except seven shares thereof, and that at the time the contract was entered into and at all times since, the corporation had no stock and was not authorized to issue any more. The trial court properly denied the relief sought, for the corporation could not legally issue the stock. *Cook, Corporations*, 426. The court was, therefore, powerless to enforce specific performance or to award damages. *Morgan v. Bell*, 3 Wash. 554, 28 Pac. 925, 16 L. R. A. 614; *Peters v. Van Horn*, 37 Wash. 550, 79 Pac. 1110.

Judgment affirmed.

DUNBAR, C. J., FULLERTON, and GOSE, JJ., concur.

[Nos. 9410, 9411. Department Two. August 23, 1911.]

**T. F. TRUMBULL, *Appellant*, v. LIZZIE M. BRUCE *et al.*,
Respondents.**

**T. F. TRUMBULL, *Appellant*, v. CLAY LAWRENCE *et al.*,
Respondents.¹**

TAXATION—REDEMPTION—PAYMENT OF TAX JUDGMENT—TENANTS IN COMMON—ADVERSE TITLE—LIEN. Where a tenant in common pays a tax judgment and takes an assignment of the judgment, the certificate is merged in the judgment, and the payment operates for the benefit of the remaining tenants in common, subject to a lien for their portion of the tax; under Rem. & Bal. Code, § 9265, providing that the receipt of redemption money shall operate as a release of all claims by virtue of the certificate, and § 9258, providing that any person interested in lands may pay the taxes and have a lien for the payments made, and § 9259, providing that redemption shall inure to the benefit of the legal or equitable title, subject to the right of reimbursement of the person making the payment.

TAXATION—TAX TITLES—TAXES PAID—CERTIFICATES—VALIDITY. A certificate of delinquency for taxes that have been paid by the holder of a prior certificate is void, and cannot sustain an action for foreclosure, although the holder paid the taxes for three subsequent years upon which he might have secured a certificate.

SAME—DELINQUENCY CERTIFICATE—COST ITEMS INCLUDED. A certificate of delinquency is invalidated by the inclusion of the attorney's fees and other costs of the foreclosure of a prior certificate which are not allowable in such foreclosures.

SAME—CERTIFICATE OF DELINQUENCY—PAYMENT OF TAXES DUE. The applicant for the foreclosure of a certificate of delinquency must pay all taxes due and unpaid on the property.

TENANCY IN COMMON—ACQUISITION OF ADVERSE TITLE—TAX CERTIFICATES. The fact that a tenant in common of community property paid for a redemption from taxes out of her separate estate does not militate against the rule that the redemption inured to the benefit of her cotenants.

TAXATION—TAX TITLE—FORECLOSURE—RELIEF—EQUITY JURISDICTION—LIEN FOR TAXES. The foreclosure of a tax certificate being a special proceeding, upon failure of the action, the court cannot re-

¹Reported in 117 Pac. 472.

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tain jurisdiction to grant equitable relief for taxes paid, and the action should be dismissed without prejudice to an appropriate proceeding to establish an equitable lien.

Appeal from a judgment of the superior court for Clallam county, Still, J., entered September 17, 1910, in favor of the defendants, after a trial on the merits before the court without a jury, in consolidated actions to foreclose tax certificates of delinquency. Affirmed.

Trumbull & Trumbull, for appellant.

Mitchell & Lawrence, for respondents.

MORRIS, J.—Appellant brought these two actions to foreclose certificates of delinquency for unpaid taxes upon lands in Clallam county. The situation in both cases being the same, the actions were consolidated and heard as one in the court below, and are so treated here. Respondents, answering, set up a number of affirmative defenses, which were sustained by the court below, and this appeal is taken from a judgment in their favor.

The record is wholly documentary, and shows that on May 22, 1900, the property in question vested in John Cain and his wife, Mamie L. Cain. On May 23, 1900, by general warranty deeds, the Cains conveyed to A. J. Cochran and Ole J. Ekre an undivided one-eighth of these lands to each, and on July 7, 1902, another undivided one-eighth of the land was conveyed to E. R. Hendee and E. D. Hinds by general warranty deed. On March 17, 1903, the county issued to L. A. Brower a certificate of delinquency of these lands, for the unpaid taxes for the years 1900 and 1901, amounting to \$46.08. Brower paid the subsequent taxes for 1902 and 1903, and, on October 15, 1904, commenced a foreclosure of his certificate. In the meantime, on April 30, 1904, the Cains, by general warranty deed, had conveyed an undivided three-eighths of the land to the Angeles and British Columbia Land Company. On February 7, 1905, Ekre redeemed his

one-eighth of the land from the lien of the certificate; and on March 1, 1905, the certificate was assigned to Adam Weidinger, and he was substituted as plaintiff in the foreclosure suit, in which judgment for a foreclosure as prayed for was entered on August 19, 1905. This judgment was assigned to Mamie L. Cain September 2, 1905.

At the time of the issuance of this certificate of delinquency, it will be noted that the Cains were the owners of an undivided five-eighths of the property, the remaining interests being in Cochran, Ekre, Hendee, and Hinds. At the time of the assignment of the foreclosure judgment to Mamie L. Cain, the Cains were the owners of two-eighths of the property, their other three-eighths having passed to the land company on April 30, 1904. All these interests, subsequently and at different dates, vested in the respondents Lawrence, the last conveyance being jointly by the Cains and Cochran of their undivided three-eighths interest, the respondent Bruce acquiring her interest from Lawrence November 14, 1907.

On April 13, 1909, appellant procured from the treasurer of Clallam county two different certificates of delinquency, one covering the land of respondent Lawrence and the other the land of respondent Bruce. These certificates purported to be for the redemption of an undivided seven-eighths of the property described in the certificate issued to Brower March 17, 1903, for the years 1900 and 1901, the other one-eighth having been previously redeemed by Ekre, and on their face stated they were issued for the years 1900, 1901, 1902, and 1903. On the same day appellant paid the unpaid taxes on these lands for the years 1904, 1905, and 1906, and on April 21, 1909, he commenced these suits to foreclose, and filed his applications for judgment. He failed and neglected, however, to pay the taxes for the year 1908, which were due and unpaid on April 21, 1909, when he filed his applications for judgment. This record is silent as to the taxes for the year 1907, and no question is here raised thereon. We assume, therefore, they have been paid by respondents or their

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grantors prior to the issuance of the certificates to appellant. Upon these facts the court below held appellant was not entitled to a foreclosure, and gave judgment to respondents.

It will not be necessary to make any special reference to the errors assigned, as they are based upon the admissibility of the record made by respondents, and the entry of judgment. Neither can we find any merit in them. The certificate issued to Brower covered the years 1900 and 1901. Previously to his foreclosure of this certificate, he paid the taxes for the years 1902 and 1903, and when on September 2, 1905, Mamie L. Cain paid the judgment and took an assignment, the Cains being at that time tenants in common owning an undivided interest in the lands, such payment operated for the benefit of the remaining tenants in common, and the Cains could, and did, obtain nothing by the assignment of the judgment other than a lien against the remaining interest for a just proportion of the amount paid. *Stone v. Marshall*, 52 Wash. 375, 100 Pac. 858.

The Brower certificate, which by its foreclosure had ripened into this judgment, was of no more effect. It had fulfilled its mission when it furnished the basis for this judgment, and the only thing remaining in which it could play any part would be the issuance of a deed, which, so far as the Cains were concerned, would not change the situation, as they could not obtain a tax title to the exclusion of their co-owners. *Stone v. Marshall, supra*. There was, therefore, nothing to redeem, so far as the tax certificate was concerned. The Cains could not hold both as judgment creditors and as holders and owners of the tax certificate, any more than a mortgagee after a decree of foreclosure could be said to hold by virtue of the mortgage. The decree and the decree alone bespeaks the interest and the whole interest of the parties. Under § 9265, Rem. & Bal. Code, it is provided that the receipt of redemption money upon any tract of land upon which a certificate of delinquency is outstanding shall operate as a release of all claims under or by virtue of such certificate, and shall be

noted as a payment of the taxes. The person making such payment being entitled to a certificate of redemption, § 9258 provides that any person owning an interest in lands upon which judgment of foreclosure of delinquency certificate is prayed may pay such taxes and such payment shall vest in them a lien on the property for such payment so made. Section 9259 provides that any redemption made shall inure to the benefit of the person having the legal or equitable title to the property redeemed, subject to the right of the person making the redemption to be reimbursed by the person benefited. The most that Mamie L. Cain could obtain, then, under her assignment of the judgment of foreclosure, would be a certificate of redemption, which would vest in her the right to be reimbursed by the other owners to the extent of their proportionate share, and to hold such redemption as a lien against the property until so reimbursed.

The certificates of appellant were void further in attempting to carry as delinquent and subject to certificate the taxes of 1902 and 1903. These taxes had been paid by Brower before he commenced foreclosure of his certificate. They were not therefore delinquent, and the county, having received them, could not include them in any certificate of delinquency, and thus receive a double payment. Appellant would have been entitled to a certificate for the unpaid taxes of 1904, 1905, and 1906, but this he did not seek nor obtain, but attempted a redemption of a released certificate.

Appellant's certificates were faulty further in that they included an attorney's fee of \$10, as part of the costs in the Brower foreclosure, and other unwarranted cost items, such as stenographer's fee and copies of pleading and process. These items are not allowable as costs in foreclosures of this character, and their inclusion would vitiate any certificate of which they were a part. Neither did appellant comply with Rem. & Bal. Code, § 9262, providing in cases of this character that every holder of a certificate of delinquency shall, before applying for judgment of foreclosure, pay all taxes

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due and unpaid on the property. Application for judgment was made on April 21, 1909, and the taxes for 1908 were then due and unpaid. Appellant neglected to pay them, and they were paid by respondents on May 7, and 29.

It is stipulated that, when Mamie L. Cain obtained an assignment of the judgment upon the foreclosure of the Brower certificate, she paid for the same out of her separate estate. We cannot see that this changes the situation. She was redeeming her community estate, and such redemption would operate for the benefit of the community. Our statute permits one cotenant to redeem his undivided interest. She was not attempting to do this, but sought a redemption of all interests through the payment of the entire charge against the land. As a member of the community she was a co-owner with the others, as much as was the community itself, the only difference being the extent of the interest which is an immaterial feature, and any redemption which would operate for the benefit of one cotenant would operate for the benefit of all. Even in states which do not recognize the community system, but give the wife only an inchoate right of dower in the husband's estate, the wife of a cotenant would not be permitted to redeem or purchase at a tax sale and acquire title against the cotenants. Her attempt to do so would only result in a redemption of the land from the lien of the tax. *Robinson v. Lewis*, 68 Miss. 69, 8 South. 258, 24 Am. St. 254, 10 L. R. A. 101; *Clark v. Rainey*, 72 Miss. 151, 16 South. 499; *Busch v. Huston*, 75 Ill. 343; *Burns v. Byrne*, 45 Iowa 285. Much stronger reasoning would exist for the adoption of such a rule under the community system.

The decree of the court below was without prejudice to any right in appellant to establish an equitable lien upon the land by virtue of his payment of the taxes for 1904, 1905, and 1906. This was proper. A tax foreclosure is a special proceeding, under a special statute, for a special purpose; and when it fails, the court cannot retain jurisdiction to grant general relief or establish an equitable lien for taxes

paid. If appellant desires to establish an equitable lien upon this property for these taxes, he must do so in an appropriate proceeding involving such an issue. *Barker v. Muehler*, 55 Wash. 411, 104 Pac. 637.

The judgment is affirmed.

CHADWICK, ELLIS, and CROW, JJ., concur.

[No. 9314. Department Two. August 25, 1911.]

LITTLE BILL OF MAQUIQUI, *Appellant*, v. JOHN SWANSON
*et al., Respondents.*¹

INDIANS—LANDS—ACTIONS TO RECOVER—LIMITATION OF ACTIONS—BY DEATH. The written consent of an Indian allottee to the sale of his lands by commissioners, under 27 Stats. at L. 633, is not revoked by his death prior to the sale.

INDIANS—LANDS—TITLE OF ALLOTTEE—DESCENT—ADMINISTRATION—NECESSARY PARTIES—UNITED STATES. An Indian allottee of lands who, as a citizen of the United States, holds a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a certain period and until removed by legislative act, has a base or qualified fee, which descends upon his death under the laws of descent of the state (made applicable by 24 Stats. at L. 388, § 5), and the United States is not interested in the devolution of title by inheritance and is not a necessary party to proceedings in probate administering the estate.

UNITED STATES — DEPARTMENTS — DECISION OF INTERIOR DEPARTMENT—CONCLUSIVENESS—INDIANS—LANDS — HEIRSHIP. Where lands were granted to an Indian by a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a certain period and until removed by legislative act, and by 27 Stats. at L. 633, exercise of the power of alienation was provided for by sales and conveyances by a commissioner and trustee upon written consent of the allottee, and conveyance was made accordingly, the determination of the question of heirship of a deceased allottee, determined under rules and in the manner provided by the interior department in order to authorize a trustee's sale, is final and *res judicata*.

¹Reported in 117 Pac. 481.

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INDIANS—LANDS—ACTIONS TO RECOVER—LIMITATION OF ACTIONS—RETROACTIVE STATUTES. 32 Stats. at L. 284, providing that the statutes of limitations of the states shall apply to actions by any Indian patentee, for the possession of lands patented in severalty, where a deed thereof has been approved by the secretary of the interior, the same as for the recovery of land patented to others than Indians, is retroactive, although the lands were not at the time subject to alienation, and the whole period of the limitations need not run after the issuance of the deed by the trustee; especially in view of the added proviso that "this act shall not apply to any suits brought within one year from and after its passage;" hence an action to recover lands in 1905 is barred where the patentee died in 1888, at which time the land immediately went into possession of one claiming as sole heir at law under a decree of the probate court, to the knowledge of the plaintiff.

INDIANS—LANDS—ACTIONS TO RECOVER—LACHES. The doctrine of laches is not inapplicable to actions at law for the recovery of lands, and bars an action commenced in 1905 by an Indian who had severed his tribal relations and was a citizen of the United States, and who claimed as heir of an original allottee from the government who died in 1888, where defendant's predecessor in interest was at that time adjudged the sole heir by the probate court, and went into possession, and it appears that plaintiff knew of such possession and claim of heirship and frequently visited there without making any claim to the land at that time, nor later when the interior department made a similar finding as to the heirship and issued deeds upon the consent of such heir, the land having increased in value from \$90 to \$600 per acre, and purchasers in good faith having paid for the lands and made extensive improvements thereon.

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered April 20, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment. Affirmed.

E. D. Wilcox, Wesley Lloyd, and Jesse Thomas, for appellant.

Bates, Peer & Peterson, for respondents.

CROW, J.—This action was originally commenced by Little Bill or Maquiqui, against John Swanson, Hilma Swanson, his wife, Anton Nelson, Bertha Nelson, his wife, Gustaf Peterson, Anna Peterson, his wife, Elizabeth Spott Sahms, Willie

Sahms, her husband, George Spott, and Edwin Eells, as guardian of George Spott, a minor, to recover twenty acres of land in Pierce county. From a judgment in favor of the defendants Swanson, Nelson, and Peterson, the plaintiff has appealed.

There is no material dispute as to the facts. On the evidence we conclude the findings made and entered by the trial judge must be sustained. From the evidence the following facts appear: The appellant, Little Bill, whose Indian name is Maquiqui, is of Indian birth. Since the year 1887 he has maintained no tribal relations, but has been a citizen of the United States. By virtue of a written treaty between the United States and certain bands of Indians, including the Puyallup tribe, made on December 26, 1854, the land here involved, together with other lands, was allotted to George Jacobs, a member of the Puyallup tribe, whose Indian name was Slowitson, but who was commonly known as George Jake. He took possession, and on January 30, 1886, the president of the United States issued to him, under the name of George Jacobs, a patent which contained restrictions on alienation. George Jake, who was a bachelor, died intestate on July 10, 1888, and left surviving him as his next of kin Little Bill, or Maquiqui, appellant herein, who was a brother of Betsy or Betholitza, the deceased mother of George Jake; and also left surviving him one Peter Spott, an Indian, his first cousin, who was the only son of a deceased sister of the deceased father of George Jake.

At the time of his death, George Jake was in peaceful possession of the land, holding under his patent. In March, 1890, Peter Spott, claiming to be sole heir at law of George Jake, caused a petition for administration upon his estate to be filed in the superior court of Pierce county. One Joseph Winyer was duly appointed and qualified as administrator. Due and regular administration was had, by which it was adjudged that Peter Spott, as next of kin and heir at law, was entitled to the entire estate. Immediately after the death

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of George Jake, Peter Spott entered into the open, notorious, and adverse possession of the land, cleared the same, and erected buildings and made other improvements thereon. While he thus held and claimed the land, he was frequently visited by the appellant, Little Bill, who was aware of his possession and claim as sole heir at law of George Jake. On March 3, 1903, an act of Congress was approved (27 Stats. at Large, 633), providing for the appointment of three Puyallup Indian commissioners and defining their duties, which in part were:

“To select and appraise such portions of the allotted land as are not required for homes for the Indian allottees, . . . and if the secretary of the interior shall approve the selections and appraisements made by said commission, the allotted land so selected shall be sold for the benefit of the allottees after due notice at public auction, at not less than the appraised value for cash, or one third cash and the remainder on such time as the secretary of the interior may determine, to be secured by a vendor's lien on the property sold; . . . to superintend the sale of said lands, ascertain who are the true owners of the allotted lands, have guardians duly appointed for the minor heirs of any deceased allottees, make deed for the lands to the purchasers thereof, subject to the approval of the secretary of the interior, which deed shall operate as a complete conveyance of the land upon the full payment of the purchase money, and the whole amount received for the allotted land shall be placed in the treasury to the credit of the Indian entitled thereto, and the same shall be paid to him in such sums and at such times as the commissioner of Indian affairs, with the approval of the secretary of the interior, shall direct. . . . That the Indian allottees shall not have power of alienation of the allotted lands not selected for sale by said commission, for a period of ten years from the date of the passage of this act, and no part of the allotted land shall be offered for sale until the Indian or Indians entitled to the same shall have signed a written agreement consenting to the sale thereof, and appointing said commissioners, or a majority of them, trustees to sell said land and make a deed to the purchaser thereof; . . . The deeds executed by said commission shall not be valid until approved

by the secretary of the interior, who is hereby directed to make all necessary regulations to carry out the purposes of the foregoing provisions. . . .”

Under date of November 6, 1893, the department of the interior of the United States sent written instructions to the commissioners:

“To select and appraise such portions of the allotted lands as are not required for homes for the Indian allottees; then to obtain from the Indian or Indians entitled to the same, a written agreement signed and executed in the proper manner, consenting to the sale thereof at a sum not less than the appraiser’s value and appointing and constituting you as commissioners, or a majority of you, trustees to sell said lands and make deed to the purchasers of the same. If Indian allottees or heads of families have died since the issuance of patents for lands selected and appraised for sale, you will determine the legal heirs of such allottee or head of family in accordance with the laws of the state of Washington; or, in other words, the true owners of the allotted lands; and have guardians duly appointed for the minor heirs of any deceased allottees, and obtain the consent of the heirs of twenty-one years and such guardians.”

In 1895 the commissioners received further instructions, to the effect:

“That the commissioners were not required to go into the state courts in order to determine who are the heirs of these allottees, but to themselves apply the rule prescribed in their instructions, and when the ‘heir’ or ‘true owner’ is so ascertained, to obtain his consent to the sale of his allotment in the manner provided by the act . . . that the president would have the right to prescribe rules for the descent of these lands. The president speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties.”

James J. Anderson, John W. Renfroe, and Ross J. Alexander, duly appointed and qualified in the year 1893, as Puyallup commissioners, proceeded with the discharge of their duties, found and reported that George Jake died intestate in the year 1888; that he left Peter Spott, his first cousin, sur-

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viving him as his next of kin and heir at law, who under the laws of Washington became the owner of the allotted and patented land of the decedent. This finding was later approved by the secretary of the interior. On January 1, 1899, Peter Spott, while in the exclusive possession of the land, died intestate, leaving surviving him a minor child named George Spott, and a widow named Elizabeth Spott, both Puyallup Indians, as his heirs at law, who continued in the occupation, possession, and exclusive use of the land until April 5, 1899, when it was sold to respondents herein as hereinafter stated. Elizabeth Spott later intermarried with one Willie Sahms, and has since been known as Elizabeth Spott Sahms. On July 2, 1897, Clinton A. Snowdon was appointed sole commissioner of the lands of the Puyallup Indian reservation under the act of June 7, 1897 (30 Stats. at Large, 87).

In the year 1898 and prior to his death, Peter Spott, as heir at law of George Jake, pursuant to the act of Congress of March 3, 1893 (27 Stats. 633), and the act of June 7, 1897 (30 Stats. at Large, 87, *supra*), signed, executed, and acknowledged an instrument in writing whereby he consented to the sale of the land and appointed Clinton A. Snowdon, then sole commissioner of the lands of the Puyallup Indian reservation, the trustee to sell the land at its appraised value and make deeds to the purchasers, all subject to the approval of the secretary of the interior. Such written consent was thereafter approved by the secretary of the interior. On January 18, 1901, the secretary of the interior, in answer to an inquiry from Clinton A. Snowdon, instructed him as follows:

“Where allottees and true owners of Puyallup lands have executed their consents of sale, the same having been approved by the secretary, it has been the practice of the department to continue the sale of the lands covered thereby in the case of the death of an allottee or true owner and to distribute the funds arising from such sale to his or her heirs. The office and the department have regarded these written consents

as remaining in full force and effect upon the decease of the Indian executing the same—and further, that they are, as above indicated, in the nature of an agreement or contract to be carried out for the sole benefit of his heirs in case of his decease. . . These lands are sold under the provisions of the act of Congress, March 3, 1893, and not under the laws of the state of Washington. . . . It is for the department to pass upon the sufficiency of consents and not the courts of the state of Washington.”

In pursuance of the written consent executed by Peter Spott, and in compliance with his instructions from the department of the interior, Clinton A. Snowdon, as commissioner and trustee, advertised, and thereafter in due course sold and conveyed the land, in three separate tracts, to the respondents Swanson, Nelson, and Peterson, for the aggregate sum of \$1,800, at the rate of \$90 per acre, which was then a fair and reasonable value. The respondents immediately entered into open, exclusive, and notorious possession under their deeds, claiming title under the original patentee, George Jake, under Peter Spott as his sole heir at law, so adjudged by the superior court of Pierce county, and determined by the finding of the commissioners approved by the secretary of the interior, and also under Peter Spott's written consent and the approved deeds executed by Clinton A. Snowdon, commissioner and trustee.

At the time respondents purchased, they had no notice or knowledge of the death of Peter Spott, nor did they learn of the same until after the commencement of this action. They purchased in good faith, paid a fair consideration, made no investigation as to the death of Peter Spott, his heirs, or the members of his family, but relied exclusively upon the representations of commissioner Snowdon and of the department of the interior, and the regularity of their proceedings. Respondents have since made permanent improvements, some of them since the commencement of this action, as follows: Respondent Swanson, who purchased eight acres, has made permanent improvements of the reasonable value of \$1,850;

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respondent Nelson, who purchased four acres, has made permanent improvements of the reasonable value of \$1,400; and respondent Peterson, who purchased eight acres, has made permanent improvements of the value of \$2,500. The land, together with the improvements thereon, was, at the date of the trial, of the reasonable value of \$900 per acre, and was, at the time of the commencement of this action, of the reasonable value of \$600 per acre.

Since purchasing the land, respondents have paid all taxes levied thereon. Appellant did not assert or make any claim to any of the land as heir at law of George Jake or otherwise, until about the time of the commencement of this action in April, 1905. George Spott, minor son and heir at law of Peter Spott, died intestate, during the pendency of this action, leaving his mother, Elizabeth Spott Sahms, as his only heir at law. She, by cross-complaint filed herein, claimed the land as heir at law of her deceased husband, Peter Spott, and her deceased son, George Spott, on the theory that the sale made to respondents by Clinton A. Snowdon after the death of Peter Spott was void; that the written instrument of consent executed by Peter Spott had been revoked by his subsequent death, and that Peter Spott was the sole heir at law of George Jake, deceased. After filing her cross-complaint, all of her alleged rights and interests were transferred to the appellant, Little Bill, and all defendants, other than the respondents Swanson, Nelson, and Peterson and their respective wives, were thereupon dismissed from this action. The appellant, Little Bill, now claims all title or interest that may have been held by Peter Spott or his heirs at law, on the theory of a revocation of Peter Spott's written consent by his death prior to any sale by Snowdon, trustee. He also prosecutes his original claim as heir at law of George Jake, deceased.

The trial court concluded the appellant has been guilty of inexcusable neglect and laches in failing to assert his claim to the land; that his action has been barred by the statute of limitations; that the questions sought to be litigated herein

have been once determined by the department of the interior of the United States; that its judgment has not been appealed from or modified, is in full force and effect, and is *res adjudicata*; that this action should be dismissed; that the respondents' title should be quieted, and that the several deeds of Snowdon as commissioner and trustee conveyed an absolute fee simple title.

The above statement, made with much detail and at considerable length, is sufficient without argument to sustain the conclusions of law and final decree made and entered by the trial court. The appellant insists, (1) that laches, being an equitable defense, cannot be interposed in this action at law, and that in any event laches has not been shown; (2) that the action has not been barred by any statute of limitations; (3) that the superior court of Pierce county acted without jurisdiction in the administration proceedings; (4) that the decision of the secretary of the interior approving the finding of heirship made by the commissioners was without jurisdiction and void; (5) that the written consent executed by Peter Spott, appointing Clinton A. Snowdon trustee, was revoked by the death of Peter Spott, which occurred prior to the execution of any deeds by Snowdon, and that such deeds are void. The contention last mentioned is made in support of any interest appellant may have acquired during the pendency of this action from the heirs of Peter Spott, deceased. The decision of this court in *Prichard v. Jacobs*, 46 Wash. 562, 90 Pac. 922, refutes appellant's contention that the written consent executed by Peter Spott was revoked by his death. Further discussion of that point is unnecessary.

By the act of Congress of February 8, 1887 (24 Stats. at Large, 388), Little Bill and George Jake became citizens of the United States. 19 Opinions Attorney General of U. S. 255. George Jake was then holding land allotted to him under a patent identical in its terms, provisions, and restrictions upon alienation, with the patent considered by this

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court in *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9. We there said:

“After a careful consideration of the terms of said patent, the sixth article of the Omaha treaty, the beneficial results sought to be attained thereby, and in the light of the authorities, we conclude that the patent set forth in the complaint conveyed to Napoleon Gordon a base, or qualified, fee simple title, subject to temporary restrictions as to alienation, which might thereafter become an absolute fee simple title. The qualifications subjoined to said base fee resulted from the stipulation of said sixth article of the Omaha treaty, that if said patentee or his family should neglect to till the soil or should rove from place to place, the president might cancel said assignment, even though patent had issued. . . . Although, as intimated in *Bird v. Winyer, supra*, the only immediate practical benefit arising from the title conveyed was to secure to the patentee and his family possession and use of said land until such time as the restrictions on alienation should be removed by the legislature of the state of Washington and by act of Congress, yet the estate actually conveyed was one of inheritance, being a base fee simple title, temporarily restricted as to alienation, and subject to forfeiture in the event of the patentee or his family failing to till the soil or upon their returning to nomadic habits of life.”

By § 5 of the act of Congress of February 8, 1887 (24 Stats. at Large, 388), *supra*, the laws of descent of Washington were made applicable to allotted and patented Indian lands in this state. George Jake held an inheritable estate in the land on January 10, 1888, when he died intestate. It then devolved upon some forum to settle the question of inheritance and determine who were his heirs at law. The respondents contend the proper forum was the superior court of Pierce county, which they assert had jurisdiction both of the land and the person. In support of this contention they cite *Bird v. Terry*, 129 Fed. 472; *Bird v. Winyer*, 24 Wash. 269, 64 Pac. 178; *Guyatt v. Kautz*, 41 Wash. 115, 83 Pac. 9; *Frazee v. Piper*, 51 Wash. 278, 98 Pac. 760; *Wa-La-Note-Tke-Tynin v. Carter*, 6 Idaho 85, 53 Pac. 106. These authorities tend to sustain respondents' contention, as to which

there could be no question were it not for the point raised by appellant that the United States being interested would be a necessary party to the proceeding or action, and that it is not subject to the jurisdiction of a state court.

Unquestionably when the United States has, by patent or otherwise, reserved *title* in itself for the benefit of an Indian allottee, it would, in the absence of legislation to the contrary, become a necessary party to any action or proceeding involving such title, and an adjudication by a state court would not be binding. It was so held in *McKay v. Kalyton*, 204 U. S. 458. That case, however, is not pertinent here, as the entire argument in the opinion is predicated on the fact that the title then under consideration remained in the United States government, which held it in trust, and that a subsequent patent would in due season become necessary to convey the same to the allottee. It, therefore, became manifest that no action of the courts of the state of Oregon affecting such title held by the United States could be binding unless the United States had by statute subjected itself to the jurisdiction of such tribunals, which it had not done. No such condition as to the title exists in this action. The patent held by George Jake is vitally different from the one there under consideration, in that neither the fee nor the title was retained by the United States. On the contrary, title passed to George Jake, the patentee, subject to the possibility of defeat by a roving life, and subject also to restrictions upon alienation. The United States had no interest in the devolution of the title by inheritance, and was not a necessary party to any action or proceeding in which the inheritance might be determined.

Appellant further contends the United States retained, as trustee for the patentee George Jake, some power of alienation; that to exercise such power it was necessary to determine who were his heirs at law; and that the United States would be a necessary party to the proceeding where the question of heirship was an issue. Conceding, without deciding,

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this contention to be well taken, it will be noticed that by the act of March 3, 1893 (27 Stats. at Large, 633, *supra*), the United States provided for the exercise of such power of alienation, and also provided for a method of conveyance of these lands through the Indian commissioner and trustee, acting upon the written consent of the allottee. By the same statute and subsequent written instructions, it also directed that the questions of ownership and heirship should be determined by the commissioners, and that their decision should be reported to and approved by the secretary of the interior. It is conceded this was done, that no appeal has been taken from the finding, and that it stands without modification or change. The decisions of the different departments of the general government of the United States, on questions of fact within the scope of their authority, are everywhere conclusive except on appeal within the department. *Marquez v. Frisbie*, 101 U. S. 473; *Wiseman v. Eastman*, 21 Wash. 163, 57 Pac. 398. Without regard, therefore, to the question of the jurisdiction of the state court, we conclude the trial judge did not err in holding that the question of heirship, sought to be litigated herein, has been finally determined by the department of the interior, and that its judgment is *res adjudicata*.

From what has been heretofore said, it necessarily follows the trial court was correct in its conclusion that the appellant's action has been barred by the statutes of limitations of this state. Appellant contends no statute of limitations of this state is applicable, as the patented land could not be alienated by the Indian patentee or owner at any time prior to the year 1903, when the restrictions upon alienation ceased. While it is true that the United States, by the act of March 3, 1893 (27 Stats. at Large, 633, *supra*), continued the restriction upon the right of alienation until March 3, 1903, it nevertheless, by an act which took effect while such restrictions on alienation still existed, provided that, if the patentee failed to assert any alleged right he might claim, he

should, under certain circumstances, lose such right under the statutes of limitations. See act of March 31, 1902, 32 Stats. at Large, 284. Section 1 of the act reads as follows:

“That in all actions brought in any state court or United States court by *any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the secretary of the interior to the land sought to be recovered*, the statutes of limitations of the states in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said state *the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.*”

This statute seems plain in its terms. Appellant, however, contends that it is necessary for the whole period of limitations to have run after the issuance of the deeds executed by Snowdon, trustee. The portions of the statute which we have italicized disclose an intention to make it retroactive, applicable against any patentee or any successor in interest such as appellant claims to be. That the application of this statute was intended to be retroactive is further shown by its second section, which reads as follows:

“That this act shall not apply to any suits brought within one year from and after its passage.”

This section secured to the claimant a reasonable time for bringing action in case the full period of limitations had already expired. George Jake died in 1888. Peter Spott went into immediate possession, claiming to be his sole heir at law. His possession was succeeded without interruption by that of his heirs at law and by that of the respondents holding under their deeds. Little Bill knew of the death of George Jake, of the possession and claim of Peter Spott and his heirs, of the appointment of the commissioners; but did

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not commence this action until 1905, although he was at all times a citizen of the United States, and the courts were open to him. Clearly he is barred by the statutes of limitations. Rem. & Bal. Code, §§ 156, 786, 788.

We further hold, irrespective of the statutes of limitations, the trial court was right in its conclusion that the appellant has been guilty of inexcusable neglect and laches, sufficient to preclude him from any recovery herein. In response to the defense of laches, appellant contends the doctrine of laches is confined to courts of equity where it is recognized at all, and that it has no application to this action which was commenced as an action at law. In *Peterson v. Philadelphia Mtg. & Trust Co.*, 33 Wash. 464, 74 Pac. 585, it was held that equitable defenses may be interposed in an action commenced as an action at law, and that when the equitable defense has been set forth and pleaded, the cause may be first tried as one of equitable cognizance. This rule was afterwards affirmed in *Lindley v. McGlaulin*, 57 Wash. 581, 107 Pac. 355. The defense was properly pleaded and considered.

If there ever was an action in which the equitable defense of laches should be enforced, this is such action. Peter Spott claimed to be the sole heir of George Jake, deceased, took and held exclusive possession of the land under such claim, made improvements, was adjudged to be such heir by the superior court of Pierce county, and by the interior department of the United States, and executed his written consent to Clinton A. Snowdon, trustee. The respondents purchased the land in good faith for a valuable consideration, relying on all of these facts, and have made valuable improvements. The land has never been in appellant's possession, but has been held continuously since the year 1888 by others whose claims were adverse to him. When this action was commenced, it had advanced in value from \$90 to \$600 per acre. Little Bill knew of George Jake's death and that Peter Spott had taken possession under a claim of heirship. He lived less than twenty miles from the land and frequently visited Peter

Spott. He made no claim of heirship, but remained quiet and inactive while respondents were making their purchases, payments, and improvements. He must have known, or should have known, they were in possession under color of title in good faith, claiming under their deeds. Yet he took no action until the year 1905, when he instituted this suit. In *Ferrell v. Lord*, 43 Wash. 667, 86 Pac. 1060, we said:

“Where a case is of purely equitable cognizance, in the application of the doctrine of laches courts of equity act upon their own inherent doctrine of discouraging, for the peace of society, ancient demands, and refuse to interfere where there has been gross laches in prosecuting the claim or long acquiescence in the assertion of adverse rights. *In such cases the statute of limitations does not necessarily govern the court in the application of the doctrine of laches*, 9 Ballard, Law of Real Property, § 757; *Gay v. Havermale*, 30 Wash. 622, 71 Pac. 190; *Boyer v. East*, 161 N. Y. 580, 56 N. E. 114, 76 Am. St. 290; *Gallier v. Cadwell*, 145 U. S. 368, 12 Sup. Ct. 873, 36 L. Ed. 738; *Penn. Mut. Ins. Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223, 42 L. Ed. 626. There is no inflexible rule controlling the application of the defense of laches. The facts and circumstances of each case must govern courts of equity in permitting said defenses to be made. The authorities show that, while lapse of time is one of the elements to be considered in applying this equitable defense to stale claims, it is only one, and that it is not necessarily the controlling or most important one. Regard must be had to all of the facts and surrounding circumstances, and if, when carefully considered, they do not appeal to the conscience of the chancellor, on behalf of a claimant, the defense of laches should be allowed.”

In *Schrumpscher v. Stockton*, 183 U. S. 290, the supreme court of the United States said:

“Conceding, but without deciding, that so long as Indians maintain their tribal relations they are not chargeable with laches or failure to assert their claims within the time prescribed by statutes, as to which see *Felix v. Patrick*, 145 U. S. 317, 330; S. C., 36 Fed. Rep. 457, 461; *Swartzel v. Rogers*, 3 Kansas 374; *Blue Jacket v. Johnson Co.*, 3 Kansas 299; *Wiley v. Keokuk*, 6 Kansas 94; *Ingraham v. Ward*, 56 Kan-

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sas 550, they would lose this immunity when their relations with their tribe were dissolved by accepting allotments of lands in severalty."

Statutes of the United States providing for allotment of Indian lands and patents, with restrictions upon alienation, were enacted to protect Indians from schemes and fraudulent practices of white men, not to aid in the unconscionable and inequitable enforcement of stale claims, to the injury of innocent parties who in good faith, for value, and by regular procedure, have purchased allotted Indian lands through the interior department of the United States. Appellant has at all times since the death of George Jake been a citizen of the United States. Courts of justice have been open to him for the assertion and protection of his rights. Should he now be awarded a recovery in this action, the result would be that the very statutes enacted to prevent frauds would be an aid to fraud. Courts of equity will not countenance the prosecution of stale, unjust, and inequitable claims.

The judgment is affirmed.

DUNBAR, C. J., MORRIS, and CHADWICK, JJ., concur.

ELLIS, J., took no part.

[No. 9384. Department Two. August 25, 1911.]

WHITE BROS. & CRUM COMPANY, LIMITED, *Appellant*, v.
JACOB H. WATSON *et al.*, *Respondents*.¹

PLEADING—COMPLAINT—DEMURRER—INFERENCES. In the absence of a motion to make more definite and certain, a demurrer should not be sustained because of the failure of a complaint to allege a certain fact, where the fact can be inferred from the whole complaint.

WATERS AND WATER COURSES—APPROPRIATION ON PUBLIC LANDS—EASEMENT FOR DIVERSION—CHANGE—SECONDARY EASEMENT. The prior appropriator of the waters of a creek, not diverted on his own lands, has no right, under U. S. Rev. St. § 2340, providing that all patents shall be subject to any vested and accrued water rights or rights to ditches in connection therewith, to make any change in the character of the servitude by fixing a new point of diversion or changing the ditch to a pipe line, upon the washing out of the ditch by erosions and slides whereby the water supply was lost, even if the subsequent patentee of the servient estate is not able to make any beneficial use of the water; and such change cannot be sustained as a "secondary" easement to enter and repair the ditch.

Appeal from a judgment of the superior court for Whitman county, Canfield, J., entered June 15, 1910, upon sustaining a demurrer to the complaint, dismissing an action for equitable relief. Affirmed.

E. V. Kuykendall and *C. C. Gose*, for appellant.

Hanna & Hanna, for respondents.

ELLIS, J.—Appeal from a judgment sustaining a general demurrer to appellant's amended complaint, which is long but which, so far as essential to our consideration, may be epitomized as follows: Yakiwawai creek, a stream not navigable, has its source in Whitman county, Washington, about two miles above the land of respondents described in the complaint, and thence flows to and across that land and the lands of the appellant, also described in the complaint. The re-

¹Reported in 117 Pac. 497.

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spondents acquired their land by filing thereon as a government homestead on April 16, 1902. In 1881 the appellant's predecessors in interest appropriated all the waters of the creek and carried the same by a ditch and flume from the point of diversion to the lands now owned by the appellant, and ever since the water has been applied to a beneficial use by the appellant upon its land, which without irrigation is arid and unproductive, but with irrigation is highly productive.

At the time of the appropriation of the water, respondents' land and all the lands riparian to the creek above the appellant's lands were public lands of the United States. All of the land above the appellant's land drained by the creek is steep and precipitous, is used only for pasturage, and the rainfall and melting snows are not retained thereon, but readily flow into and cause frequent floods of the creek. The stream, until it reaches the appellant's land, flows through a narrow canyon with steep bluffs on either side, and has a fall of approximately two thousand feet from its source to appellant's land. In the spring of 1907, the flood waters of the creek destroyed appellant's flume and head ditch, and washed away the banks at the point of diversion, making it impossible to divert the water by means of the ditch and flume previously used. The bed of the stream was eroded, causing the water to flow over a sandy and gravelly bottom, so that since the flood, much of the water is lost at the original point of diversion. The right of way by which the water has been carried is along a steep bluff, and respondents' lands traversed by it are unfit for cultivation. The right of way is gravelly, and if appellant is required to convey the water by a ditch, a great part of it will be lost by percolation and evaporation, causing a material injury to the appellant and being of no benefit to respondents. About seventy-six feet above the point of diversion the stream flows over a natural bed rock, and it is necessary, in order to secure and retain full use of the water, to change the point of diversion to that

point, there construct a cement dam, and thence lay a pipe line along the right of way across respondents' land to that of appellant. Unless this is permitted, the appellant will in the future be wholly deprived of the use of the water. Prior to commencing this action, appellant went upon the respondents' land to construct the proposed dam and pipe line, when respondents, by force and threats of violence, prevented, and still prevent, the work. The prayer is for an injunction against interference, for damages, that title to the water, right of way, pipe line, and head works be quieted in appellant, and for general relief.

It will be noted that there is no direct allegation that the point of diversion, either as originally located or as now proposed, is upon the respondents' land. This is urged as one reason that the demurrer was properly sustained. The inference, however, from a reading of the whole amended complaint, is that both of these points and the site of the proposed dam are upon respondents' land. In the absence of a motion to make the amended complaint more specific in these particulars, the demurrer should not have been sustained on this ground.

Assuming these points to be alleged as implied, Does the amended complaint state a cause of action? The demurrer concedes that the appellant's predecessors in interest had appropriated the water at the original point of diversion, and were conducting it by ditch and flume over the original right of way, prior to the inception of respondents' title and while the fee of respondents' land was still in the United States. Section 2339 of the Revised Statutes of the United States provides for the recognition by the courts of vested and accrued water rights, and § 2340 is as follows:

"All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section."

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Respondents, therefore, took their land subject to the easement for the diversion of the water at a then fixed point, and for the conveyance of the water by ditch and flume on a then existing right of way across their land to that of the appellants. The grant from the government to the respondents was that of a servient tenement, subject to a definite easement. There can be no difference between the easement so acquired and an easement created by grant of a private owner who afterwards conveys the servient tenement. In either case the owner of the dominant tenement has an easement which he cannot change without the consent of the grantee of the servient tenement. The grant from the government to the respondents was subject to "vested and accrued water rights or rights to ditches and reservoirs used in connection with such water rights as may have been acquired," etc. There is no intention evinced by the statute to make the grant subject to such water rights or rights to ditches and reservoirs as may thereafter become necessary or convenient. That a change in the mode of enjoyment might have been made while the government still owned the servient tenement does not alter the case. That was because the owner of the servient tenement—the government—had accorded a license through the statute to appropriate any such rights at any time prior to the grant of patent or allowance of homestead or preemption. But when the government granted the fee, it granted it subject not to the license, but to vested and accrued rights which had then been acquired under the license. *Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453; *Oliver v. Agasse*, 132 Cal. 297, 64 Pac. 401. By the grant the title to everything not then appropriated became vested in the respondents as completely as the appropriated rights had become vested in the appellant. Thereafter the *jus disponendi* incident to the fee was in respondents as to every right not vested in others by actual prior appropriation. The manner of diversion, the length and location of the right of way, the means of conveyance of the water over the right

of way—in short, the easement, became fixed and determined by the facts as they existed when respondents' homestead entry was allowed. No change can now be made in the character of the servitude. A pipe line cannot be substituted for a ditch and flume, nor the right of way changed or lengthened. As to these things the authorities are uniform. Weil's Water Rights in the Western States (2d ed.), pp. 285, 286, §§ 179-180, Title B, Change of Means of Use; *Oliver v. Agasse, supra*; *Vestal v. Young*, 147 Cal. 715, 82 Pac. 381; *Johnston v. Hyde*, 32 N. J. Eq. 446; *Allen v. San Jose Land & Water Co.*, 92 Cal. 138, 28 Pac. 215, 15 L. R. A. 93; *Dickenson v. Grand Junction Canal Co.*, 15 Beav. 260; *Barrows v. Fox*, 98 Cal. 63, 32 Pac. 811; *Gregory v. Nelson*, 41 Cal. 278.

"It is the exclusive right of the owner of the servient tenement, suffering the burdens of an easement localized and defined, to say whether or not the dominant owner shall be permitted to change the character or plan of the servitude." *Jaqui v. Johnson*, 27 N. J. Eq. 526, 532.

It is suggested that the right which the appellant is seeking to obtain is rather an implied or secondary easement than an additional servitude. The term "secondary easement" is applied to the right to enter and repair and do those things necessary to the full enjoyment of an easement as existing. We have been cited to no authority for extending that term to a change, alteration, or extension such as is here contemplated, while the above authorities hold that the things contemplated are in their nature additional servitudes.

Counsel argues with much force and persuasiveness that, inasmuch as the respondents will in no wise be injured by a change from ditch and flume to pipe line, the right to make the change should be accorded to the appellant; that the taking of the additional right of way and conducting the water in a pipe line invades no substantial right of the respondents. But even if it were shown that the change would be an actual benefit to the respondents we would have no power to compel

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them to accept the benefit. The question is one of property rights, not of benefits or injuries. Many authorities so hold, and we have been cited to none to the contrary.

"No one has a right to compel another to have his property improved in a particular manner; it is as illegal to force him to receive a benefit as to submit to an injury." *Merritt v. Parker*, 1 N. J. L. 526, 533.

See, also, *Allen v. San Jose Land & Water Co.*, and *Dickenson v. Grand Junction Canal Co.*, *supra*; *Tillotson v. Smith*, 32 N. H. 90, 64 Am. Dec. 355.

The alteration by the action of the elements of the physical conditions so as to make the enjoyment of the easement impossible or more difficult, was appellant's misfortune as an impairment of its property, just as if the elements had impaired the enjoyment of its property of any other character. This furnishes no reason why another should be required to contribute to restore the enjoyment of the property, even if the thing to be contributed be something the other does not need, and the surrender of which will not injure him. If it is something in which he has the actual right of property there is no rule of law nor principle of equity which would warrant a court in taking it from him against his will or for the benefit of another. No amount of hardship in a given case would justify the establishment of such a precedent. The next step in the invasion of the right of property would be to invite the courts to measure the comparative needs of private parties, and compel a transfer to the one most needing and who might best utilize the property. If a man may be required to surrender what is his own, because he does not need it and cannot use it, and because another does need it and can use it, then there is no reason why he may not be required to surrender what he needs but little because another needs it much. A doctrine so insidiously dangerous should never find lodgment in the body of the law through judicial declaration. The judiciary may only apply the law according to established principles. If rights such as those here

contended for are to be accorded and can be accorded within the limits of our constitution, it should be done by statute clearly defining the rights, fixing their limits, and prescribing the procedure.

The demurrer was properly sustained. Affirmed.

DUNBAR, C. J., CROW, FULLERTON, and MORRIS, JJ., concur.

[Nos. 9585, 9586. Department Two. August 25, 1911.]

ALASKA BANKING & SAFE DEPOSIT COMPANY, *Respondent*, v.
THOMAS C. NOYES *et al.*, *Appellants*.

ALICE NOYES MURRAY *et al.*, *Appellants*, v. ELMIRA NOYES
et al., *Respondents*.¹

EXECUTORS AND ADMINISTRATORS—DECREE OF DISTRIBUTION — CONCLUSIVENESS—AS CONSTRUCTION OF WILL. A final decree of distribution in probate, setting off half of the property as the community property of the widow, and passing half to the distributees in the will, is conclusive if unappealed from, and cannot be collaterally attacked by showing that the property was the separate property of the deceased and that all passed under the will.

APPEAL—REVIEW—MOOT QUESTIONS. Where the final order of distribution amounted to a construction of the will and was unappealed from and conclusive, the supreme court will not construe the will at the request of a portion of the parties, where there are objecting parties whose rights could not be affected by the decision.

EXECUTORS AND ADMINISTRATORS — DISTRIBUTION — ESTOPPEL—ASSENT TO PROCEEDINGS. Where a final decree of distribution was entered in 1903, setting aside the undivided half of the property to the widow as her community property, and the other half to the devisees named in the will, all notices having been given and its integrity not questioned until 1910, parties and third persons dealing with it on the faith of the record are estopped to defeat intervening equities by the claim that it was the separate property of the deceased and as such subject to restrictions in the will, in view of the presumption that property standing in the name of married persons is community property.

¹Reported in 117 Pac. 492.

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WILLS — PROBATE OF FOREIGN WILL — ANCILLARY ADMINISTRATION.
The probate of a foreign will upon a foreign certificate of probate, is not ancillary to the foreign proceeding in such a sense that the final distribution of real property located in this state passing under the will would not be a final construction of the will.

Appeal from a judgment of the superior court for King county, Gilliam, J., entered December 9, 1910, in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action to foreclose a mortgage; also, an appeal from a judgment dismissing an action to enjoin the trial of the foreclosure action. Affirmed.

Shepard & Daly, for appellants.

Bogle, Merritt & Bogle, for respondent.

CHADWICK, J.—On March 21, 1902, John Noyes, a resident of Montana, died testate, seized of real and personal property in Montana, and certain property known as the Rainier Grand Hotel in King county, in this state. The will was propounded in Montana, and was there admitted to probate on April 21, 1902. On May 1, 1902, the will, with certificate of probate duly attested by the Montana court, was filed in the superior court of King county, and on May 16, 1902, it was admitted to probate. Letters of administration with will annexed were issued to F. S. DeWolfe. The estate was administered as the community property of John Noyes and Elmira Noyes, his wife. The regularity of the probate proceedings, of which all the parties interested had notice and of which the court had jurisdiction, cannot be questioned. A decree of distribution was in due season formally entered, whereby the court set over to the widow, Elmira Noyes, one-half of all the property real and personal as her own as her community interest therein. The remainder was distributed, one-half to Elmira Noyes and one-half to the four children of the decedent, the latter one-half to be held by Elmira Noyes and her children as tenants in

common, subject to the conditions and restrictions contained in the will, which is in form as follows:

“In the Name of God, Amen.

“I, John Noyes, of Seattle, in the state of Washington, being of sound mind and memory, but realizing the uncertainties of life, do hereby make, publish and ordain this my last will and testament, that is to say:

“First: I give, bequeath and devise to my wife Elmira Noyes, one undivided half interest in and to all of my property, real, personal, and mixed, and wherever situated. To have and to hold the same unto my said wife, and to her heirs and representatives and assigns forever.

“Second: I give, bequeath and devise unto my children Alice (married to W. McC. White), John D. Noyes, Thomas C. Noyes and Ruth (called Dolly) Noyes, the remaining undivided half interest in and to all my property, real, personal and mixed, and wherever situated, in equal shares and proportions (one undivided eight interest each), To have and to hold the said one undivided half interest unto my said children in the shares and proportions mentioned, and to their heirs and representatives and assigns forever. This devise to my children, however, is made subject to the following conditions, viz:

“Third: It is my will and I so direct, that all the property which I now own, or which I may own at the time of my death, and which is or shall be situated in the city of Seattle, in the state of Washington, shall descend under this will to my wife and children in the proportions hereinbefore mentioned, but the same shall remain and be held by my said wife and children as tenants in common, and neither my wife nor any of my children shall sell or dispose of the same or any part thereof, or any interest therein, until after the death of my wife, but until such time the same shall be under the control and management of my wife solely, who shall manage the same and collect the rents, issues and profits arising therefrom, and she, my said wife, shall have for her own use one-half of the rents and profits arising from such property after the payment of all costs and expenses, and the remaining rents, issues and profits, after the payment of expenses, shall be paid to my said children in proportion to their respective holdings in the said property. This clause shall apply only to real estate in the said city of Seattle, and shall not apply

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to personal property which at the time of my death shall be situated in the said city of Seattle. My object in placing this restriction upon the disposal of my Seattle property is that the same may remain in my family for their use until the death of my wife, and that no other person may acquire any interest in the same or in the rents or profits arising therefrom, and any conveyance which any of my devisees shall make or attempt to make of any of the said property or any interest therein shall not take effect until the death of my wife, nor shall any person under any claim whatever have any right to the possession of said property, or any interest therein, or to any of the rents, issues or profits arising therefrom, until the death of my wife, but until her death she shall have the entire control and management of the same, and shall appropriate the rents, issues and profits as hereinbefore directed, and not otherwise, and this devise is made subject to such conditions.

"Fourth: I hereby nominate and appoint my wife Elmira Noyes the sole executrix of this my last will and testament and direct that she act as such without bonds.

"Witness my hand at Butte City, in Silver Bow county in the state of Montana, this seventh day of November A. D. 1898.
John Noyes."

On December 21, 1907, Elmira Noyes conveyed an undivided one-fourth of the Rainier Grand Hotel property to Thomas C. Noyes, who thereafter made a mortgage in favor of the Alaska Banking & Safe Deposit Company to which we shall hereafter refer as the Alaska Company. On November 5, 1908, Thomas C. Noyes, his wife joining him, executed another mortgage in favor of the Alaska Company. This mortgage recites that it was executed so that the community interest of the parties, if any, might be subject to the terms of the mortgage made by Thomas C. Noyes alone. On June 23, 1910, Thomas C. Noyes and his wife executed a deed, reconveying the one-fourth interest theretofore conveyed by Elmira Noyes to Thomas C. Noyes. While the title was in Thomas C. Noyes, an attachment was levied upon his interest in the hotel property by certain of his creditors. On June 16, 1910, the Alaska Company began this action to foreclose

its mortgage. The right to foreclose is resisted upon several grounds, one of them being that the mortgage was given to secure an antecedent debt, and that it is therefore subject to the superior equities of those claiming under the will. It will be seen that this question, admitting that a mortgage for an antecedent debt is subject to equities, will depend upon our ruling upon the main issue tendered by appellants, which is that the will, taken as a whole, creates no more than a life estate in Elmira Noyes in the Seattle property, subject to a trust in the rents, etc., in favor of the other devisees, and that there is no power of alienation in any one for any part of the property during the lifetime of Elmira Noyes.

The force to be given to a decree of distribution is no longer an open question in this state. In *In re Ostlund's Estate*, 57 Wash. 359, 106 Pac. 1116, 135 Am. St. 990, it was contended that the decree had been erroneously entered. The decree was upheld. It was there said:

"The contention that the court, in rendering the decree, erroneously determined who was entitled to the property as distributee upon distribution of the estate of Elsie Ostlund, goes only to the merits of the question then before the court, and is wholly foreign to the question of the jurisdiction of the court to determine who was entitled to the property then being distributed. . . . It is true the decree does not create the title in the distributees, but it is a solemn adjudication of who acquired the title of the deceased, and if rendered upon due process of law is final and conclusive upon that question. Its very object and purpose is to judicially determine who takes the property left by the deceased."

It was the purpose of the court in that case to forever set at rest the opinion, prevailing to some extent, that a probate proceeding was something of less importance than an ordinary civil action, and that a decree formally entered could be questioned by any one although a party, where, as in that as well as in this case, it was thereafter believed to have been entered upon a mistake of fact or an erroneous conception of the law. The remedy of a party in all such cases is by ap-

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peal, and the *Ostlund* case brings decrees entered in probate within the rules governing collateral attack in civil actions, as declared in the following decisions: *Peyton v. Peyton*, 28 Wash. 278, 68 Pac. 757; *Wick v. Rea*, 54 Wash. 424, 103 Pac. 462, and cases there cited.

Having arrived at this conclusion, it is not incumbent on us to discuss the law of restraint upon alienation or the doctrines of life estate and incidental trusts. The decree of the lower court foreclosing respondent's mortgage is therefore affirmed.

While the foreclosure suit was pending, Alice Noyes Murray and Ruth Noyes Heinze began an independent action, setting up the theory we have briefly outlined; that is, that the Seattle property was the separate property of John Noyes, and as such was entirely controlled by the restrictive clauses of the will; that the proceeding was one primarily for the probate of the will; that no issue as to the title of John Noyes, or the claim of Elmira Noyes, was tendered; and that the complainants had no notice until the commencement of these proceedings of the fact that one-half of the property had been set over to Elmira Noyes as her community interest in the estate.

It is contended that the probate proceedings were such as to deprive complainants of their property rights in defiance of the fourteenth amendment to the constitution of the United States. To their complaint Elmira Noyes, the widow, filed a cross-complaint, in which she sets up, that all orders and proceedings occurring in the probate proceeding were taken without her knowledge; that the administration of the estate was directed by the administrator upon the mistaken theory that our community property law attached to the property of nonresident spouses, an error common to the practice and the profession until the decision in *Brookman v. Durkee*, 46 Wash. 578, 90 Pac. 914, 123 Am. St. 944, 12 L. R. A. (N. S.) 921, had been pronounced. This case came on for hearing at or about the same time the foreclosure case was

called for trial, upon demurrers to the complaint and cross-complaint. The Alaska Company, the only respondent filing a brief in this court, demurred upon the ground that another action was pending, and the complaint did not state facts sufficient to constitute a cause of action. Like demurrers were filed by the attaching creditors, who were made parties to this suit. Thomas C. Noyes and wife and John D. Noyes demurred to the complaint, upon the ground that it did not state facts sufficient to constitute a cause of action. Defendants Bogle, Merritt & Bogle demurred upon the several grounds that another action was pending, that there was an improper joinder of actions, that there were no facts constituting a cause of action, and that the action had not been begun within the period limited by law. Upon formal hearing, all of these demurrers were sustained, presumably upon the ground that they did not state facts sufficient to constitute a cause of action. Whereupon the court dismissed the complaint and cross-complaint. Plaintiffs had demurred to the cross-complaint but, so far as the record shows, the issue thus joined was not disposed of. This latter case is brought to our court upon the appeal of Alice Noyes Murray and Ruth Noyes Heinze, and in their brief they say:

“It is of the utmost importance to all the devisees under the Noyes will that it shall be speedily ascertained, by a final decision of this court, whether the restrictive clause of that will is or is not wholly or partially void for repugnancy. If the judgment in the foreclosure suit which this cause was brought to enjoin should be affirmed, on the appeal therefrom pending in this court and to be heard at the same time as this appeal, a refunding of that mortgage debt by the placing of a new mortgage upon the entire interest in the Rainier-Grand Hotel property would be their only means of saving the quarter interest of Thomas C. Noyes from loss through a sheriff's deed under the foreclosure. This means they are all willing to resort to, if necessary, in order to preserve their interests from the complications threatened by undivided ownership with strangers. But a mortgage cannot be placed while their power of alienation rests in doubt; and

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the period of redemption from the foreclosure will expire early in February next. Therefore we earnestly request that this court, whatever may be its views upon the other questions raised on these appeals, and however unnecessary, consequently, the court may deem a construction of the will to be, will pass directly upon the question here discussed, and declare whether the will does or does not lawfully restrain alienation."

The status of the property having been declared by the decree of distribution, of which all parties had notice and from which no appeal was taken, we feel that it would be a work of supererogation on the part of this court to construe the will of John Noyes; for, so long as there are objecting parties, the courts are powerless to annul the decree or to limit its effect in an independent action. The defendants John D. Noyes, Thomas C. Noyes, and his wife, appear as objectors, and as such are entitled to insist that the decree of distribution shall stand as it is. If the parties were all agreed that the probate proceedings were prosecuted upon a wrong theory, that the property was the separate property of John Noyes, deceased, and should have been distributed as the plaintiffs Alice and Ruth and the widow, Elmira Noyes, now insist, we know of no policy or statute that would prevent a court of equity from entering a decree voicing the present will of those concerned; or the parties might, being so agreed, accomplish the same purpose by contract. But so long as they are not agreed and the interests of third parties are undisposed of, it would accomplish no purpose for us to say what might or should have been held had the court had other light of law and fact at the time the decree of distribution was entered.

But independent of our holding that the decree of distribution is conclusive, and however forcible the contention of appellants might have been if urged in the probate proceeding or upon distribution, we feel that, so far as the Alaska Company and others similarly situated are concerned, all

parties are bound by the decree, sustained as it is by the conduct of the parties, which may be properly termed acts of construction from the time the petition for the probate of the will was filed until the decree was entered. The will was the subject of the court's intervention, and the estate was administered and distributed as community property. The decree was in itself a construction of the will. It was assumed that the undivided half of the estate was the property of the widow. The decree of distribution was entered on July 23, 1903, and from it no appeal was taken. All notices provided by law seem to have been given. Its integrity was not questioned by any one until the answers were filed in this case. We think clearly, that, considering the whole record in the light of the presumption that property standing in the name of married persons is community property, parties and third persons dealing with it on the faith of the record are clearly estopped to question the decree, or to defeat intervening equities by suggesting that the whole estate was in fact the separate property of John Noyes, and as such subject to the restrictions of the will.

Neither can we agree with counsel's contention that the probate proceedings in this state was ancillary to the like proceedings in Montana, and that Elmira Noyes is bound by her conduct, or, as it is asserted, her election therein. The courts of this state have been vested with jurisdiction absolute over the property of decedents. Those claiming an interest in real property have no rights therein that our own laws do not give, or such as may be recognized in the absence of a statute under the doctrine of comity. The statute, Rem. & Bal. Code, § 1317, providing for the probate of foreign wills, neither extends nor limits the powers of the court. It goes only to the form and manner of proving their execution. Our courts act independently of the foreign court, and may do as they please with the property so long as they keep within the limitations of the statutory law. 1 Woerner, American Law of Administration (2d ed.), 158.

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Syllabus.

It is assigned as error that the attorney's fee allowed by the court in the foreclosure suit is exorbitant, but inasmuch as the fee is approximately the same as fixed by the appellants' witnesses, and about one-half of the sum fixed by respondent's witnesses, we are not disposed to hold that it is unreasonable.

Decrees affirmed.

DUNBAR, C. J., ELLIS, CROW, and MORRIS, JJ., concur.

[No. 9658. *En Banc*. August 25, 1911.]

JOSEPH MURPHY, *Appellant*, v. THE CITY OF SPOKANE,
Respondent.¹

ELECTIONS—CONDUCTING—DUTIES OF OFFICERS — IRREGULARITIES—EFFECT. Where it does not appear that a fair election has been prevented, an election is not invalidated by reason of the failure of the election officers to observe or comply with the statutory requirements that a certain number of election officers be selected and qualified in a specified manner, that they be present at all times, that they take an oath of office, or that the polls be opened on time and kept open during the time prescribed by law, since the provisions are directory merely.

ELECTIONS — CONDUCT — CLOSING POLLS—ACTIONS—PLEADING. An allegation that by reason of the closing of the polls before the time fixed by law many qualified voters were deprived of the right of voting, is not sufficient to invalidate the election, where it does not appear how long before the closing hour the polls were closed, or that any voters coming to the polls before that time were prevented from voting.

ELECTIONS — CONDUCT — OFFICERS — PREJUDICE — PAYMENT OF EXPENSE. The fact that election officers were prejudiced and their appointment influenced by their opinions, and the expense of the election paid by parties interested in the propositions, does not invalidate the election, in the absence of any fraud upon the election itself.

MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—BONDS — POWER TO ISSUE—SINKING FUND. Rem. & Bal. Code, § 7507, subd. 5, granting to a city power to issue bonds in place of, or to supply means to

¹Reported in 117 Pac. 476.

meet maturing bonds or for the consolidation or funding of bonds, does not authorize a city, upon the issuance of bonds, to pay for a public improvement costing \$875,000, to issue additional bonds in the sum of \$125,000 to be placed in a sinking fund and preserved inviolate for fifty years for the purpose of redeeming and paying the other bonds then to become due; since a sinking fund is to be applied to the extinguishment of a principal debt and cannot be created as part of the debt itself.

Appeal from a judgment of the superior court for Spokane county, Kennan, J., entered May 23, 1911, upon sustaining a demurrer to the complaint, dismissing an action to enjoin the issuance of municipal bonds, after a hearing before the court. Modified.

Del Carey Smith and Ed Farley, for appellant.

Alfred M. Craven and Alex M. Winston, for respondent.

MORRIS, J.—Appellant brought this action to enjoin the city and its officers from issuing and disposing of certain bonds for park purposes, and to declare the bonds illegal because of alleged irregularities in the election at which the proposition to issue the bonds carried. A demurrer was sustained to the complaint, and appellant, refusing to plead further, appeals from the judgment of dismissal. We are therefore only called upon to review the complaint as to whether or no the demurrer was well taken.

The complaint alleges three causes of action, setting forth that, on March 22, 1910, an ordinance was passed, providing for submitting to the electors of the city, at a special municipal election to be held May 3, 1910, a proposition to incur an indebtedness of \$1,000,000 for the purpose of acquiring and improving parks, playgrounds, and boulevards, for issuing bonds to evidence such indebtedness, and to create a sinking fund. The election was so held, and the proposition submitted carried. The election is attacked in the first cause of action upon the grounds that, at each of the various election precincts, one or more of the judges and inspectors appointed by the city council failed and neglected to qualify or

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serve as such officials, that no other persons were selected in their place, and that in each of the precincts a less number of election officials than the law requires were present; that the judges of election in those precincts where the officials were less than required were prejudiced in favor of incurring the indebtedness; that the election officials were suggested to the common council by citizens who were interested in the success of the proposition, and who promised to pay, and did pay, the compensation of such election officials; that some of the election officials failed and neglected to take the required oath before entering upon their duties; that the submitted proposition would not have carried without the votes from those precincts where these irregularities occurred.

The second cause of action, in so far as it contains new matter, alleges: That the private citizens who suggested the officials nominated by the common council as election officers, and who paid their compensation, were interested in property in and near the city which it is believed they desire to sell to the city for park purposes; that the polling places in some of the precincts were not opened at the time required by law, nor kept open for the required time, and many voters were thus denied the privilege of voting against the bonds. The third cause of action sets forth, that out of the proceeds of the sale of the bonds, \$875,000 is to be expended for park purposes and the like, and \$125,000 is to be placed in a sinking fund which is to be preserved inviolate for the period of fifty years, for the purpose of redeeming and paying the bonds then to become due. This sinking fund proposition is then attacked upon the ground that there is no authority in the city to establish or create such a fund.

The questions suggested in the first two causes of action are similar and may be treated together, and we are called upon to determine whether such irregularities as are there alleged are fatal to an election, and because of them the election must be held illegal or void. That the complaint alleges irregularities must be admitted, but are they such as to defeat

the election and render nugatory the will of the people as therein expressed? The purpose of an election, whether for men or for measures such as the one before us, is to give effect to the voice of the people; and when the people have spoken, their verdict should not be disturbed by the courts, nor the election in which they have voiced it held void unless it is clearly so. Every election should be carried on under certain rules and regulations adopted by the law-making power to prevent disorder and to afford an opportunity for the expression of the popular will and an ascertainment of the result with certainty. Such rules, however, are generally held to be directory merely, and not so mandatory or jurisdictional in their character as to defeat an election in which they are not wholly observed; and the rule for determining the character of the regulation is given in McCrary on Elections, § 225, as:

“If the statute expressly declares any particular act to be essential to the validity of the election, or that its omission shall render the election void, all courts whose duty it is to enforce such statute, must so hold, whether the particular act in question goes to the merits or affects the result of the election, or not. Such a statute is imperative, and all considerations touching its policy or impolicy must be addressed to the legislature. But if, as in most cases, that statute simply provides that certain acts or things shall be done within a particular time or in a particular manner, and does not declare that their performance is essential to the validity of the election, then they will be regarded as mandatory if they do, and directory if they do not, affect the actual merits of the election.”

This rule is well established by the authorities, and has received recognition in this court in *Seymour v. Tacoma*, 6 Wash. 427, 33 Pac. 1059, where it was sought to invalidate a bond election upon the ground that the notice of election was not such as was required by the ordinance calling the election. The failure was held not to be fatal, and it was said:

“Certain rules as to notice of elections have become well settled, and none of them are better settled than that the

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formalities of giving notice, although prescribed by statute, are directory merely, unless there is a declaration that, unless the formalities are observed the election shall be void."

In *Moyer v. Van de Vanter*, 12 Wash. 377, 41 Pac. 60, 50 Am. St. 900, 29 L. R. A. 670, a contest over the office of sheriff, it was sought to set aside the election, among other things, because the election officers in certain precincts failed to place the initials of the inspector or any judge upon the ballots before depositing them in the ballot box, as the law then required; and also the statutory requirement in regard to election booths was not complied with. Both were held to be irregularities not affecting the election. Our election law requires the appointment of two judges and one inspector, who shall constitute the election board in each precinct; and provides, in case those appointed are not present at the opening of the polls, the electors present may choose a board of election. The statute, however, fails to state that any election not so presided over by such or all of such election officers shall be void, and it must be held that the provision is directory merely, and the fact that all of the election precincts did not have their full quota of officials cannot be held to vitiate the election. *Sanders v. Lacks*, 142 Mo. 255, 43 S. W. 653; *Gilleland v. Schuyler*, 9 Kan. 569; *State ex rel. Bancroft v. Stumpf*, 21 Wis.*579.

Neither is it essential to the validity of an election that all the election officers be present at all times during the receiving of the ballots; the absence of one or more of them being held to be an irregularity not affecting the result. *Packwood v. Brownell*, 121 Cal. 478, 53 Pac. 1079; *Anderson v. Likens*, 104 Ky. 699, 47 S. W. 867; *Major v. Barker*, 99 Ky. 305, 35 S. W. 543; *State v. Nicholson*, 102 N. C. 465, 9 S. E. 545; *Tanner v. Deen*, 108 Ga. 95, 33 S. E. 832; *Lee v. State*, 49 Ala. 43; *Thompson v. Ewing*, 1 Brewster (Pa.) 67.

The law prescribes that each of the election officers, before entering upon the discharge of his duties, shall take and subscribe to an oath the form of which is given in the statute;

but it has uniformly been held that the failure to take such oath, in the absence of any such provision of the law, shall not be held to defeat the election nor disturb its results; such officers, though unsworn, being held to be *de facto* if not *de jure* officers. *Taylor v. Taylor*, 10 Minn. 107; *People ex rel. Lee v. Prewett*, 124 Cal. 7, 56 Pac. 619; *Sanders v. Lacks, supra*; *Rounds v. Smart*, 71 Me. 380; *People ex rel. Fuller v. Hilliard*, 29 Ill. 413. Nor will the election be declared illegal because the election officers were not duly chosen or were not qualified. *Wells v. Taylor*, 5 Mont. 202, 3 Pac. 255; *Thompson v. Erwing, supra*. The failure to open the polls on time, and to keep them open during the time prescribed in the law, is likewise held to be such an irregularity as will not vitiate the election. *Pickett v. Russell*, 42 Fla. 116, 28 South. 764; *Graham v. Graham*, 24 Ky. Law 548, 68 S. W. 1093; *Holland v. Davies*, 36 Ark. 446; *Fry v. Booth*, 19 Ohio St. 25; *People ex rel. Fisher v. Hasbrouck*, 12 Misc. Rep. 188, 47 N. Y. Supp. 109.

In *State ex rel. Bailey v. Smith*, 4 Wash. 661, 30 Pac. 1064, a contest over a school election, it was held that the provision of the law requiring the polls in such election to be open not later than one o'clock p. m., and closed not earlier than eight p. m., was mandatory; but the election was held valid although the polls closed at seven p. m., it not being shown that, had a larger number of votes been cast, the result would have been different.

The principle underlying all these decisions is that the rights of the voters should not be prejudiced by the errors or wrongful acts of the election officers, unless it be made to appear that a fair election was prevented by reason of the alleged irregularities. It is said, in *Moyer v. Van de Vanter, supra*, that there is

“a clear distinction between those things required of the individual voter and those imposed upon election officers. . . where there has been a substantial compliance with the law on the part of the individual voter, and it is made to appear

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that there has been in fact an honest expression of the popular will, there is a well defined tendency to sustain the same, although there may have been a failure to comply with some of the specific provisions of the law upon the part of the election officers or some of them."

The complaint in this connection avers that, by reason of closing the polls before the time fixed in the law and in the notice, many qualified voters were deprived of the right and privilege of voting against the bonds. It does not appear how long before the proper closing time the polls were actually closed; whether one hour, or one minute. Nor does it appear that any qualified voters came to the polls to vote before the proper closing hour and were prevented from voting because the polls were then closed, which would be an allegation of a provable fact. To say voters were deprived of the right to vote is a mere conclusion, unless it be coupled with a statement of facts showing such actual deprivation.

Neither do we think that the allegation that officers of the election were prejudiced in favor of the bonding proposition is sufficient to vitiate the election, without its appearing that such prejudice was fraudulently employed in preventing a fair and impartial election. It would be difficult to obtain election officers who did not have a sentiment of favoritism or opposition toward some candidate or measure to be chosen or defeated at the election. We know of no reason in law why a man chosen as an election official should refrain from expressing a choice upon some question to be determined by the election, nor why his known attitude should disqualify him or defeat the result of the election, unless it be made to appear that, by reason of such attitude, a fair and impartial election was not held. It has been held that the fact that a candidate for office at the election acts as an election officer will not defeat the election. *People v. Avery*, 102 Mich. 572, 61 N. W. 4; *Sweepston v. Barton*, 39 Ark. 549; *State ex rel. Murphy v. Bernier*, 98 Minn. 1, 38 N. W. 368. To hold otherwise would be to say that no good citizen could sit on an

election board where a bonding proposition was submitted to the people. For it is not only proper but commendable that, upon such an issue involving the expenditure of large municipal funds, every citizen should form and express an intelligent opinion as to the merits or demerits of the proposition, and seek to impress his fellow citizens with a like intelligent view. Such a course is to be encouraged. If we were permitted to moralize, we might add that a great fault with the people of today is that, upon propositions of this character, they vote blindly and without any sufficient comprehension of the real situation confronting them or an intelligent grasp of the true meaning and effect of the question submitted to them. The more intelligent the vote and the greater the interest taken in these questions affecting our municipalities, the greater the benefit to us and to our posterity.

That the appointment of the election officials was influenced by those in favor of the bonds, and that the expense of the election was paid by them, will not of itself vitiate the election. We apprehend that, in all elections, the appointing power is influenced by men or circumstances in selecting the election officials. The reason for their selection is unimportant, unless it be made to appear that in some way it has worked a fraud upon the election itself. It has never been held, so far as any cause has been called to our attention, that to relieve a municipality of part of its public burden, such as the payment of necessary expenses, or the raising of needful public funds, works a fraud in any election which becomes a part of that expense. The citizens of an entire community will not be presumed to be bribed to vote for a measure they would otherwise have opposed because a body of their fellow citizens undertake to bear the expense of the election. Whatever their motives may be, the evil—if evil it be—the law will not presume attaches to the whole body of electors, and fraudulently causes them to change their attitude on any public question. The law must presume that an intelligent people is too self-respecting to be improperly influenced by any such

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fact. We cannot, therefore, hold that the fact that the expenses of this election were borne by citizens who favored the bonds is of itself sufficient to illegalize the result. This question has often arisen in cases where it has been sought to remove county seats or public structures, upon certain citizens or communities who favored the removal undertaking to bear the entire expense incident thereto, such as donations of land, building of court house, and other public structures. It has never been regarded as having any controlling influence upon the election. *Dishon v. Smith*, 10 Iowa 212; *State ex rel. Newell v. Purdy*, 36 Wis. 213, 17 Am. Rep. 485; *Wells v. Taylor*, *supra*.

An interesting case cited in many of the above decisions is *People v. Cook*, 14 Barb. 259, and same case on appeal, 8 N. Y. 67, where irregularities of the character here referred to are treated as of no vitiating effect upon the election. See, also, *Patton v. Watkins*, 131 Ala. 387, 31 South. 93, 90 Am. St. 43, where it is held that failing to provide booths for the voters, closing the polls at noon, and permitting an official marker to mark the ballots of many voters, without any oath of their inability to do so, all of which was contrary to the statute, would not render the election invalid. The note to this case gives an exhaustive review of the whole subject. Appellant cites *Commonwealth ex rel. Eades v. Weir*, 15 Pa. County Court 425, as sustaining his contention that the failure of the city to pay the election expenses is fatal to the election. The case does not so hold. The only question before the court in that case was whether the county or the city should pay the expenses of an election involving only a municipal indebtedness. It was held that the city should bear the expense.

This brings us to the last question in the case, the validity of the issue of \$125,000 in bonds, the proceeds to be placed in a fund for the purpose of retiring the bonds at their maturity. The plan suggested is unique and, so far as we have been able to find, or as has been suggested by counsel, finds

no parallel in the annals of the law. The city undertakes to sustain its authority in this regard by referring us to certain enumerated powers of the city. Rem. & Bal. Code, § 7507. Subdivision 5 of this section is the only one which could have any possible reference to the present condition. It is that the city shall have power, "To issue bonds in place of, or to supply means to meet maturing bonds or other indebtedness, or for the consolidation or funding of the same." But the purpose of the law, as well as the character of a sinking fund, has been utterly misconceived. A sinking fund is "the aggregate of sums of money (as those arising from particular taxes or sources of revenue) set apart and invested, usually at fixed intervals, for the extinguishment of the debt of a government or corporation by the accumulation of interest." *Elser v. Ft. Worth* (Tex. Civ. App.), 27 S. W. 739. A sinking fund is "a fund arising from particular taxes, imposts or duties, which is appropriated toward the payment of the interest due on a public loan and for the payment of the principal." *Union Pac. R. Co. v. Com'rs Buffalo County*, 9 Neb. 449, 4 N. W. 53; *Brooke v. Philadelphia*, 162 Pa. St. 123, 29 Atl. 387, 24 L. R. A. 781. It is a fund to be applied to the extinguishment of a principal debt, and by no contrivance can it be created as a part of the debt itself. It is a fund provided by accumulation of municipal revenues or by special taxation to meet an existing debt. To create a sinking fund by incurring a debt is the very antithesis of what a sinking fund should be. To allow a municipality to borrow a dollar and at the same time to borrow another dollar with which to retire the first dollar, after a term of fifty years, would be not only unbusinesslike but hazardous in the extreme. Granting the proposed issue of \$125,000 bonds the character of a sinking fund, it could not be used by the city for any purpose other than the retirement of the debt. Admitting, but without deciding, that the city could loan the money and accumulate a fund of interest, it would not avail the city, for it would fall far short of an amount necessary to

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retire the original issue; for we may assume that the city could not, in a period of fifty years, gather a greater rate of interest than it is paying, and further, that the accumulation of interest would be swallowed up in the retirement of interest coupons.

We attach no importance to the suggestion that the ordinance makes special provision for the creation of a sinking fund. If it had not, it would still have been the duty of the city to do so.

We find, therefore, that plaintiff has no cause of action, except in so far as the issue of \$125,000 for a sinking fund is concerned. As to that, the demurrer should have been overruled. In all other respects the judgment below is affirmed. Remanded for modification of judgment.

DUNBAR, C. J., CHADWICK, FULLERTON, ELLIS, CROW, and MOUNT, JJ., concur.

[No. 9425. Department Two. September 6, 1911.]

BESSIE KENNY HILLMAN, *a Minor*, by C. D. Hillman, *her Guardian, etc., Appellant*, v. STAR PUBLISHING COMPANY, *Respondent*.¹

LIBEL AND SLANDER — PUBLICATION OF PHOTOGRAPH — STATUTES — CONSTRUCTION. The publication of plaintiff's photograph, which was a true likeness and inoffensive in itself, in connection with a story of her father's crime, is not a libel as defined by Rem. & Bal. Code, §§ 2424 and 292, providing that it is a libel to expose any living person to hatred, contempt or obloquy or to deprive him of the benefit of public confidence or social intercourse, and that it is sufficient to allege generally that the publication was of and concerning the plaintiff, without alleging extrinsic facts showing the application of the matter; since the photograph did not make the article "of and concerning" the plaintiff.

TORTS — RIGHT OF PRIVACY — PUBLICATION OF PHOTOGRAPH. The publication of an inoffensive photograph and true likeness of a person, in connection with the story of her father's crime, is not an invasion of the right of privacy for which the law affords any remedy.

¹Reported in 117 Pac. 594.

Appeal from a judgment of the superior court for King county, Albertson, J., entered November 18, 1910, upon sustaining a demurrer to the complaint, dismissing an action for libel. Affirmed.

Frederick R. Burch and Oliver Hulback, for appellant.

John H. Perry, for respondent.

CHADWICK, J.—On or about August 26, 1910, a Federal grand jury indicted C. D. Hillman and he was arrested. This fact was made merchandise by defendant, the publisher of a newspaper in the city where plaintiff resides. It published on the front page of its paper the following article:

“HILLMAN ACCUSED OF FRAUD.

“WARRANT FOR BIG REAL ESTATE SHARK. FEDERAL OFFICIALS ARE HOT ON HIS TRAIL.

“Charged by the United States government officials with attempting one of the biggest swindles in the history of the northwest, C. D. Hillman, millionaire real estate operator, whose specialty has been selling lands to poor men, will be arrested this afternoon.

“Warrants issued today charge Hillman and three of his associates with conspiracy for using the mails to defraud. Other charges will follow says United States District Attorney Todd. The penalty prescribed is not more than five years in the penitentiary and not more than \$10,000 fine. With Hillman, in the warrant signed today by United States Post Office Inspector C. J. Backus are: Sam S. Sutter, Hillman's lieutenant in operating the steamer Venus in carrying would-be purchasers to see the Hillman property. T. E. Keeley, in charge of the Everett offices. H. C. Peet, president of the 'Great Northern Land and Loan Company,' 470 Arcade building. The warrant for Hillman's arrest follows a searching investigation by the federal officials in Seattle. A great mass of evidence has been gathered.

“THE SPECIFIC CHARGE.

“The specific charge laid against Hillman today is based on a new real estate deal Hillman is now engaged on, ten miles from Everett. Hillman has acquired title to about 12,000 acres of logged off lands at Port Susan. Hillman called this the 'Birmingham Townsite Addition' to Everett.

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He was offering parcels of this land for sale at \$100 and more. Prospectuses and blind advertisements were sent out by Hillman, it is charged, giving glowing accounts of the future of Birmingham. A sawmill and charcoal factory were all to be established there Hillman claimed. All these things, according to the federal officers, were untrue and without foundation.

"WAS IN TROUBLE BEFORE.

"Hillman was convicted on a similar charge in 1905. At that time he appealed to the supreme court and a new trial was granted on the contention that Hillman should have been granted a change of venue prior to his first trial. For some reason, this new trial was never held, and Hillman slowly but very energetically resumed operations in Seattle. The first complaints against Hillman were made after his management of a sale of lots on Lake Washington. This tract he called the 'Garden of Eden.' Among other specific complaints made in the warrant upon which Hillman will be arrested today, is one that alleges that on April 2, 1909, he rented a box number 1393 in the Seattle post office under the assumed name of C. A. Spencer. This constitutes another violation of the federal statutes. Filed with the complaint against C. D. Hillman and three of his associates today in the United States court are marked copies of two Seattle newspapers in which appeared last Sunday a score or more of 'blind' want advertisements, calculated, the complaint alleges, to defraud the readers of these papers."

It also published a photograph of C. D. Hillman and other members of his family, including this plaintiff, who has brought this action for damages. It is alleged:

"That by reason of said printing and publishing of said articles and said headlines, in conjunction with the photograph of said plaintiff, and that of C. D. Hillman, plaintiff has been and is exposed to public hatred, contempt and ridicule, and has thereby been deprived of the benefits of public confidence and social intercourse, and has thereby suffered great shame, humiliation and sense of disgrace, to her great damage."

Defendant demurred to the complaint, and the court below found that it did not state facts sufficient to constitute a cause

of action, and ordered it dismissed. From this judgment an appeal is taken.

It is insisted that a right of recovery can be sustained upon the grounds, both or either, (a) that the article and photograph when taken together are libelous, or (b) that the unauthorized publication of the photograph is an invasion of the right of privacy, and when coupled with the offensive article, entitles plaintiff to compensatory damages. Whether the act of the defendant is a libel can be disposed of by reference to our statute. Turning to §§ 2424 and 292, Rem. & Bal. Code, we find that it is a libel "to expose any living person to hatred, contempt, ridicule or obloquy, or to deprive him of the benefit of public confidence or social intercourse;" and that "In an action for libel or slander, it shall not be necessary to state in the complaint any extrinsic facts for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause arose, but it shall be sufficient to state generally that the same was published or spoken concerning the plaintiff; and if such allegation be controverted, the plaintiff shall be bound to establish on trial that it was so published or spoken." The complaint alleges that the photograph is a true likeness of plaintiff. We do not find that the mere publication of a photograph, although under circumstances indicating a wilful disregard of private right, is such a publication as is contemplated by the statute. It could have no tendency to expose a party to contempt, ridicule, or obloquy, or operate to deprive her of social enjoyment among right-thinking people. It would rather excite pity for the victim, and invite the contempt of the public toward those who, for the mere sake of sensation and gain, are willing to take that which is not their own to serve an unworthy end. Again, the published photograph being a true likeness and being in and of itself inoffensive, it cannot be held that, because of its publication in connection therewith, the article was "of or concerning" the plaintiff. We shall

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not pursue this feature of the case beyond the statutes, for we deem them to be controlling.

Although it is not contended in the briefs that any purpose was served by the publication of plaintiff's photograph—indeed, it was admitted in oral argument that a wrong has been done to plaintiff, as indeed it has; yet we find that plaintiff's case does not fall within any of the rules so far recognized by the courts, permitting a recovery for an invasion of the so-called right of privacy. Unless controlled by some independent consideration (*Peck v. Tribune Co.*, 214 U. S. 185; *Foster-Milburn Co. v. Chinn*, 134 Ky. 424, 120 S. W. 364, 135 Am. St. 417; *Atkinson v. Doherty & Co.*, 121 Mich. 372, 80 N. W. 285, 80 Am. St. 507, 46 L. R. A. 219), it has been generally held that there is no such right. *Roberson v. Rochester Folding-Box Co.*, 171 N. Y. 538, 64 N. E. 442, 89 Am. St. 828, 59 L. R. A. 478; *Henry v. Cherry & Webb*, 30 R. I. 13, 73 Atl. 97, 136 Am. St. 928, 24 L. R. A. (N. S.) 991; 3 Northwestern Law Review, p. 1. Not so much because a primary right may not exist, but because, in the absence of a statute, no fixed line between public and private character can be drawn. These authorities seem to be supported by the better reason, although the subject has been discussed instructively in the following articles and decisions: *Pavesich v. New England Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68, 106 Am. St. 104, 69 L. R. A. 101; *Corliss v. Walker Co.*, 64 Fed. 280, 31 L. R. A. 283; *Von Thordorovich v. Josef Beneficial Ass'n*, 154 Fed. 912; 4 Harvard Law Review, p. 193.

The defense in this case is purely technical, a call to precedent as it has been established. A wrong is admitted, but it is said there is no remedy. We regret to say that this position is well taken.

"We do not wish to be understood as belittling the complaint. We have no reason to doubt the feeling of annoyance alleged. Indeed, we sympathize with it, and marvel at the impertinence that does not respect it. We can only say that

it is one of the ills that, under the law, cannot be redressed.”
Atkinson v. Doherty & Co., supra.

This case presents a subject for legislation, and to the legislative body an appeal might be so framed that in the future the names of the innocent and unoffending, as well as their likenesses, shall not be linked with those whose relations to the public have made them and their reputations, in a sense, the common property of men.

Judgment affirmed.

DUNBAR, C. J., CROW, MORRIS, and ELLIS, JJ., concur.

[No. 9212. Department Two. August 11, 1911.]

REBECCA A. PRINCE, *Respondent*, v. RALPH E. PRINCE, *Appellant*¹

Appeal from a judgment of the superior court for Thurston county, Mitchell, J., entered April 11, 1910, upon findings in favor of the plaintiff, after a trial on the merits before the court without a jury, in an action for partition. Reversed.

B. H. Rhodes and Troy & Sturdevant, for appellant.

G. O. Israel, for respondent.

PER CURIAM.—Upon the authority of *Prince v. Prince*, ante p. 552, 117 Pac. 255, the judgment and decree in this case is reversed, and the case remanded with instructions to enter a decree in favor of the appellant; conditioned, however, that within ninety days after the remittitur goes down, appellant pay into the registry of the superior court the sum of \$500, for the use and benefit, and subject to the order, of Lelah A. Prince, and the further sum of \$100 subject to the order of, and for the use and benefit of, the estate of Jonathan D. Prince, deceased; the devise of property to appellant being made by the said Jonathan D. Prince upon the conditions aforesaid. It appearing to the court that appellant was a minor at the time this action was begun, and he not having complied with the conditions of said will, the court finds that equity requires that he be given an opportunity so to do. If the terms of the decree to be so entered be not complied with within the time stated, the property so devised will be subject to the further order of the superior court.

¹Reported in 117 Pac. 260.

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Opinion Per Curiam.

[No. 9315. Department Two. August 25, 1911.]

LITTLE BILL or MAQUIQUI, *Appellant*, v. JESSIE A. DYSLIN *et al.*,
Respondents.¹

Appeal from a judgment of the superior court for Pierce county, Clifford, J., entered May 21, 1910, upon findings in favor of the defendants, after a trial on the merits before the court without a jury, in an action of ejectment Affirmed.

E. D. Wilcox and *Wesley Lloyd*, for appellant.

Boyle, Warburton & Brockway and *J. J. Anderson*, for respondents.

PER CURIAM.—This action was commenced by Little Bill or Maquiqui, against Jessie A. Dyslin and others, to recover possession of certain Puyallup Indian land in Pierce county. From a judgment in favor of the defendants, the plaintiff has appealed.

The issues here raised involve the same questions presented on appeal in the cause of *Little Bill v. Swanson*, ante p. 650, 117 Pac. 481. Upon the authority of the opinion in that cause, filed on this date, the judgment herein is affirmed.

¹Reported in 117 Pac. 487.

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2. **ANIMALS—BOUNDARY AND PARTITION FENCES—TRESPASS.** The fence law, Rem. & Bal. Code, § 4977 *et seq.*, recognizing boundary and division fences, the latter to be jointly erected and maintained, requires an owner of inclosed lands to fence only against stock lawfully at large, and not against stock in an adjoining inclosed field; and where the owner of stock in his own inclosure does not avail himself of the statutory provisions for the maintenance of a division fence, the common law rule applies, and he is liable for trespass by reason of the failure of the division fence to restrain his stock. *Kobayashi v. Strangeway*..... 36
3. **SAME—FENCES—STATUTORY PROVISIONS—CONSTRUCTION.** The intent of the fence act of 1863, construed with reference to conditions then existing, was to require fencing against stock at large on the public domain, and not to change the common law rule as to fences dividing inclosed fields when not erected pursuant to the statute governing division fences. *Kobayashi v. Strangeway*..... 36

APPEAL AND ERROR:

See CRIMINAL LAW, 4-7.

Effect of and right to bail pending appeal, see BAIL.

Authority of corporate officers to dismiss, see CORPORATIONS, 1, 5.

Accounting by executor or administrator, see EXECUTORS AND ADMINISTRATORS, 3.

Harmless error in instructions in prosecution for murder, see HOMICIDE, 3.

Review of discretion in apportionment of cost of public improvement, see MUNICIPAL CORPORATIONS, 10, 11.

Harmless error in instructions in action for injuries to pedestrian struck by automobile, see MUNICIPAL CORPORATIONS, 25.

Consideration of curative acts on rehearing, see STATUTES, 3.

III. DECISIONS REVIEWABLE.

1. **APPEAL—DECISIONS REVIEWABLE—CESSATION OF CONTROVERSY—RECEIVERS.** An appeal from an order appointing a receiver for an insolvent corporation will be dismissed on the ground of a cessation of the controversy where, since the order appealed from, the corporation confessed its insolvency and consented to the appointment of a receiver in an action in the Federal court. *Young v. Schenck* 90

APPEAL AND ERROR—CONTINUED.

V. PRESERVATION AND RESERVATION IN LOWER COURT.

2. APPEAL — PRESERVATION OF GROUNDS — OBJECTIONS — MECHANICS' LIENS. Defects in a mechanics' lien which are amendable under the statute cannot be first raised in the supreme court. *James v. Brainard-Jackson & Co.*..... 175

3. APPEAL — PRESERVATION OF GROUNDS — EXCEPTIONS — SUFFICIENCY. A general exception to a specific finding is sufficient without any specification of the reasons therefor. *Prince v. Prince.*..... 552

X. RECORD.

4. APPEAL—RECORD—STATEMENT OF FACTS — AFFIDAVITS. The vacation of a default judgment, heard upon affidavits, cannot be reviewed unless the affidavits are brought up on appeal by a statement of facts or bill of exceptions, where they are not attached to the motion and part of the record. *Spoar v. Spokane Turn-Verein.*.... 208

XIII. DISMISSAL.

5. APPEAL — DISMISSAL — COPARTIES. Parties joining in an appeal without any appealable interest cannot resist a voluntary dismissal. *Young v. Schenck.*..... 90

XVI. REVIEW.

6. APPEAL — REVIEW — CORRECT DECISION ON ERRONEOUS GROUND — RIGHT TO ALLEGE ERROR—NECESSITY OF APPEAL. In an equity case, where no findings are made, a decision will be affirmed if correct under the evidence and the whole record upon any ground, although based upon an erroneous proposition of law; and the successful party need not appeal therefrom to secure a correction of the error on affirming the judgment. *Rohlinger v. Coletta Land & Orchard Co.* 348
7. APPEAL—REVIEW—CORRECT DECISION BASED ON ERRONEOUS GROUND. Where errors involving a new trial are expressly waived, and the only question is whether the evidence warrants the judgment, it is immaterial that the decision of the trial court was based upon an erroneous ground, if it was correct upon any theory of the evidence. *Durante v. Great Northern R. Co.*..... 395
8. APPEAL—REVIEW—GRANT OF NEW TRIAL—DISCRETION. An order granting a new trial for insufficiency of the evidence to sustain the verdict will not be disturbed where the evidence of witnesses, seen and heard by the trial judge, is conflicting, and no clear abuse of discretion appears. *Thomas & Co. v. Hillis.*..... 288
9. APPEAL—REVIEW—MOOT QUESTIONS. Where the final order of distribution amounted to a construction of the will and was unappealed from and conclusive, the supreme court will not construe the will

APPEAL AND ERROR—CONTINUED.

- at the request of a portion of the parties, where there are objecting parties whose rights could not be affected by the decision. *Alaska Banking & Safe Deposit Co. v. Noyes*..... 672
10. APPEAL—REVIEW—ESTOPPEL—INVITED ERROR. It cannot be claimed that the trial court's threat of punishment for contempt for refusal to produce papers prejudiced the jury, where the party refused to obey the order of the court in the presence of the jury and did not ask that the jury be excused when inviting the controversy. *Interstate Engineering Co. v. Archer*..... 629
11. APPEAL—REVIEW—FINDINGS. Findings upon conflicting and irreconcilable evidence will not be disturbed on appeal. *Seattle Merchants Association v. Germania Fire Insurance Co*..... 115
12. APPEAL—REVIEW—FINDINGS. A finding of a rescission of a contract on May 5, will not be disturbed because the only evidence of a rescission was on the 2d and 3d, it not appearing that the court attached importance to the date. *Fries v. Lockwood*..... 221
13. APPEAL—REVIEW—FINDINGS. Upon a square issue of fact, affirmed on one side and denied on the other, findings on conflicting evidence will not be disturbed on appeal unless against the clear preponderance of the evidence. *Veysey Brothers v. Bishop Mill Co.* 238
14. APPEAL—REVIEW—HARMLESS ERROR—INSTRUCTIONS. In an action against a city for injuries sustained through a defective sidewalk, error in instructions as to the city's actual notice of the defect is not prejudicial, where there was ample evidence of constructive notice to sustain the verdict. *Owen v. Seattle*..... 10
15. APPEAL—HARMLESS ERROR—ADMISSION OF EVIDENCE. Upon a prosecution for maintaining a nuisance by the sale of liquors without a license, error in admitting evidence to show that the liquor was kept in the place is harmless where there was no dispute upon that question. *State v. Falkenstine*..... 432
16. APPEAL—REVIEW—HARMLESS ERROR—EVIDENCE—FACTS OTHERWISE ESTABLISHED. Error in the admission of secondary evidence of the contents of a letter is harmless where the loss of the letter was subsequently established. *Loving v. Maltbie*..... 336
17. APPEAL—REVIEW—EVIDENCE—TRIAL DE NOVO. Error in the admission of incompetent evidence is harmless where there is a trial *de novo* on appeal. *Loving v. Maltbie*..... 336
- XVII. DETERMINATION AND DISPOSITION OF CAUSE.
18. APPEAL—DECISION—LAW OF CASE. Upon a retrial after remittitur, the decision of the supreme court becomes the law of the case, although the opinion was elaborated upon the denial of a pe-

APPEAL AND ERROR—CONTINUED.

tion for rehearing without an opportunity to be heard thereon.
Chehalis v. Cory..... 367

19. **APPEAL—DECISION—LAW OF THE CASE.** The decision of the supreme court becomes the law of the case upon a retrial, where all the material questions were raised on the first trial. *Pattison v. Seattle, Renton & Southern R. Co.*..... 370

20. **APPEAL—DECISION — REHEARING — QUESTIONS DETERMINED.** After declaring a law unconstitutional, the supreme court, may, on rehearing, consider the effect of a retroactive statute, enacted to cure the defects prior to the entry of final judgment, to the same extent as if it had been enforced on the first hearing. *State ex rel. Bussell v. Abraham*..... 621

APPEARANCE:

By attorney for incompetent in proceedings for appointment of guardian, see **INSANE PERSONS**, 1, 2.

APPLIANCES:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 3, 4, 17.

APPLICATION:

For building permit, see **MUNICIPAL CORPORATIONS**, 15-17.

APPOINTMENT:

Of guardian, see **INSANE PERSONS**.

APPORTIONMENT:

Of assessments for public improvements, see **MUNICIPAL CORPORATIONS**, 7, 10.

Cost of filling tide lands, see **PUBLIC LANDS**, 3.

Of tax, see **TAXATION**, 2.

APPROPRIATION:

Of water rights in public lands, see **WATERS AND WATER COURSES**, 1, 2, 4.

ARGUMENT OF COUNSEL:

In civil actions, see **TRIAL**, 1.

ASSAULT:

Instructing as to degrees of in prosecution for murder, see **CRIMINAL LAW**, 6.

ASSESSMENT:

- Of expenses of public improvements, see MUNICIPAL CORPORATIONS, 7, 10-14.
- Of cost of filling tide lands, see PUBLIC LANDS, 3.
- Of valuation for purpose of taxation, see TAXATION, 2.

ASSIGNMENTS:

- Transfer of mortgage debt, see MORTGAGES, 5, 6.
- Of mortgage by agent, see PRINCIPAL AND AGENT, 3.
- Set-off in action on assigned claim, see SET-OFF AND COUNTERCLAIM.
- Provision in contract against assignment, see VENDOR AND PURCHASER, 1.
- 1. ASSIGNMENTS—CAUSE OF ACTION—NEGLIGENCE OF ASSIGNEE—DILIGENCE—RIGHTS AND DUTY OF ASSIGNOR—DAMAGES—MINIMIZING. Where a half interest in claims for services was assigned to the co-owner for the purposes of collection, and attorneys were jointly employed and paid by the assignor and assignee, and suit commenced, the assignor had as much right to control the suit as the assignee, and it became his duty, when the assignee left the state and failed to diligently prosecute the suit, to minimize his damages by assuming control of the suit and recovering therein, or in a new suit in his own behalf; and he cannot recover damages from the assignee for negligence in allowing the suit to be dismissed for want of prosecution on the ground that the claims are barred by the statute of limitations. *Brockhausen v. Toklas*..... 150

ASSUMPTION:

- Of risk by employee, see MASTER AND SERVANT, 13-18, 25.
- Of facts in charge to jury, see TRIAL, 3.

ATTACHMENT:

- 1. ATTACHMENT—DISSOLUTION—FAILURE TO GIVE BOND—CONDITION PRECEDENT. On motion to dissolve an attachment erroneously issued without a bond, leave to file a bond is properly denied, the statute making the filing of a bond a condition precedent to an attachment. *Wentworth v. Moore*..... 451

ATTORNEY AND CLIENT:

- Allowance of counsel fees in divorce proceedings, see DIVORCE.
- Attorney's fees in action to foreclose mortgage and mechanics' lien, see MORTGAGES, 9.
- Attorneys in fact, see PRINCIPAL AND AGENT, 3.
- Inclusion of attorney's fees in certificate of delinquency, see TAXATION, 8.
- Argument and conduct of counsel at trial, see TRIAL, 1.

AUTHORITY:

- Of corporate officers or agents, see CORPORATIONS, 1-6.
- Of commissioners to employ alienist to assist prosecuting attorney, see COUNTIES, 1.
- Pending organization, of officers of town raised to city of third class, see MUNICIPAL CORPORATIONS, 1.
- Of engineer to change plans for public improvement, see MUNICIPAL CORPORATIONS, 6.
- Of board of public works to revoke building permit, see MUNICIPAL CORPORATIONS, 17.
- Of city to construct wharf in street extending across harbor area, see MUNICIPAL CORPORATIONS, 18.
- Of city to grant franchise to lay railroad tracks in city street, see MUNICIPAL CORPORATIONS, 19- 20.
- Of city to issue bonds for creation of sinking fund, see MUNICIPAL CORPORATIONS, 28.
- Of agent, see PRINCIPAL AND AGENT.

AUTOMOBILES:

- Excessive speed on highway, see HIGHWAYS.
- Tort of husband in negligent driving of, see HUSBAND AND WIFE.
- Injury to persons in city street, see MUNICIPAL CORPORATIONS, 21-23, 25.

BAIL:

1. **BAIL—PERSONS ENTITLED—PENDENCY OF APPEAL.** Upon a trial for murder, in which the defendant is acquitted of first degree murder by a verdict for manslaughter, the defendant is entitled to bail pending his appeal, under Rem. & Bal. Code, § 1747, providing that bail must be fixed in all criminal actions except capital cases. *State ex rel. Moorehead v. Chapman*..... 140
2. **BAIL—ORDER FOR—EFFECT OF APPEAL—STAY.** Appeal by the state from an order fixing bail does not operate as a stay of proceedings, in the absence of statute so providing; and the court has jurisdiction to and must accept bail pending the appeal, in view of Rem. & Bal. Code, § 1731, providing that on appeal the superior court retains jurisdiction for all purposes not affected by the appeal. *State ex rel. Moorehead v. Chapman*..... 140

BAR:

- Dismissal as bar to another prosecution, see CRIMINAL LAW, 1, 2.
- Of action to recover Indian lands, INDIANS, 3, 4.
- Of action by former adjudication, see JUDGMENT, 3.
- Of action by limitation, see LIMITATION OF ACTIONS.

BENEFITS:

- Assessment for from public improvement, see MUNICIPAL CORPORATIONS, 7, 10-14.
- Cost for benefits from filling tide lands, see PUBLIC LANDS, 3.

BEQUESTS:

See WILLS.

BIAS:

Of judge, see JUDGES.

BIDS:

Offer and acceptance as completed contract, see CONTRACTS, 1.

BILL OF LADING:

See CARRIERS, 1.

BILL OF PARTICULARS:

See PLEADING, 1.

BILLS AND NOTES:

Limitation of action on note, see LIMITATION OF ACTIONS, 3.

Authority of agent to indorse note, see PRINCIPAL AND AGENT, 2.

1. **BILLS AND NOTES—INDORSEMENT—BONA FIDE PURCHASER.** Notes taken as collateral security for a preexisting debt are acquired for value, where the purchaser surrendered other security given when the debt was incurred. *American Sav. Bank & Trust Co. v. Helgesen* 54
2. **SAME—TRANSFER.** Since, under Rem. & Bal. Code, § 6255, usury does not render a note void, the defense of usury is not available against a holder acquiring the notes before maturity in good faith for value. *American Sav. Bank & Trust Co. v. Helgesen*..... 54
3. **BILLS AND NOTES — INDORSEMENT — ADDITION OF “WITHOUT RECOURSE”—EFFECT.** The indorsement of a note “without recourse” does not let in equitable defenses, where the words “without recourse” were not written at the time the notes were acquired, but were subsequently inserted as an accommodation to the indorser in contemplation of a subsequent negotiation of the notes, the deal for which was not consummated. *American Sav. Bank & Trust Co. v. Helgesen* 54
4. **BILLS AND NOTES—ACTIONS—PLEADING—DEFENSES—WAIVER — INCONSISTENCY.** The denial of an allegation that plaintiff was the owner and holder of a note for value before maturity and in due course, is not waived by or inconsistent with an affirmative defense alleging want of consideration and fraud in the inception of the note, and that plaintiff had actual notice of the infirmity, “at the time it became the owner and holder of such note as in the complaint alleged;” since the admission that the plaintiff is the owner and holder of the note does not admit that it was the holder in due course for value, in good faith, before maturity. *Citizens Savings Bank v. Houtchens*..... 275

BILLS AND NOTES—CONTINUED.

5. **BILLS AND NOTES—ACTIONS—TITLE—BONA FIDE PURCHASER—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.** Where it was shown by defendants that a promissory note, given in part payment of a stallion, was tainted with fraud in the hands of the original payees, who were dealers in horses, the stallion having been returned because of false representations, in a suit on the note by a bank as endorsee, the burden of showing that it was a holder in due course for value before maturity, within Rem. & Bal. Code, § 3450, is not sustained so as to entitle plaintiff to a directed verdict, where the only evidence of the bank's alleged ownership other than possession and a blank endorsement was that of its cashier, an interested witness, who testified that he had known the payees for years, and the character of their business, that he purchased the note before maturity with twenty-five others of like character, and had previously purchased others in which litigation had arisen, that he expected the original payees to protect the bank on this note for expenses of litigation, although there was no written agreement to that effect, and that none of the makers were known to the bank or their solvency investigated; in view of the fact that his credibility was for the jury, that he carefully refrained from giving any of the attending circumstances, and that no other witnesses to the transaction, or books or records were produced. *Citizens Savings Bank v. Houtchens*..... 275

BLASTING:

Duty to give warning of, see **MASTER AND SERVANT**, 5.

BOARDS:

Power of board of public works to revoke building permit, see **MUNICIPAL CORPORATIONS**, 17.

BONA FIDE PURCHASER:

See **MORTGAGES**, 5.

Of bill of exchange or promissory note, see **BILLS AND NOTES**.

Of corporate stock, see **CORPORATIONS**, 11-14.

BONDS:

See **ATTACHMENT; BAIL**.

Liability on stock subscription for payment of corporate bonds, see **CORPORATIONS**, 16.

County bonds, see **COUNTIES**, 2-4.

Municipal bonds, see **MUNICIPAL CORPORATIONS**, 28.

BOUNDARIES:

Of upland, see **PUBLIC LANDS**, 1.

BREACH:

- Of contract, see **CONTRACTS; VENDOR AND PURCHASER**.
- Of covenant, see **COVENANTS**.
- Damages for breach of contract, see **DAMAGES, 7**.
- Of agreement by seller to not engage in competing business, see **GOOD WILL**.
- Restraining breach of contract for personal services, see **INJUNCTION**.
- Of warranty, see **INSURANCE, 2; SALES, 2-4**.

BROKERS:

1. **BROKERS—COMMISSIONS—PROCURING CAUSE.** A broker who procured a purchaser for property ready, able, and willing to buy on the terms fixed, and notified the owner thereof, is entitled to commissions, where the sale was made shortly after, although the deal was closed by another broker, with whom the property was also listed, and through whom the purchaser took up negotiations with the owner. *Grinnell Co. v. Simpson*..... 564

BUILDING CONTRACTS:

See **CONTRACTS**.

BUILDINGS:

- As trade fixtures, see **FIXTURES**.
- Permits for, see **MUNICIPAL CORPORATIONS, 15-17**.

BURDEN OF PROOF:

- To show holder of note in due course, see **BILLS AND NOTES, 5**.
- To overcome showing of necessity for location of telegraph line, see **EMINENT DOMAIN, 7**.
- To show nonresidence, see **LIMITATION OF ACTIONS, 3**.
- To explain cause of fire, see **RAILROADS, 5**.

BY-LAWS:

- Necessity of formal act of trustees required by to bind corporation, see **CORPORATIONS, 4**.

CANCELLATION OF INSTRUMENTS:

- See **REFORMATION OF INSTRUMENTS**.
- Of insurance policy as question for jury, see **INSURANCE, 1**.
- Rescission of contract, see **SALES, 2**.
- Setting aside tax deed, see **TAXATION, 10**.

CARRIERS:

- Jurisdiction of action for unjust discrimination, see **COURTS, 3**.
- Damages for breach of contract of carriage, see **DAMAGES, 7**.
- Duty to take out license for steamboat in each county in which liquor is sold, see **INTOXICATING LIQUORS**.
- Imputing negligence to driver of stage to passengers, see **NEGLIGENCE, 3**.

CARRIERS—CONTINUED.

Accident at railroad crossing, see **RAILROADS**, 1.

Instructing as to passenger's duty to reduce damages, in action for breach of contract of carriage, see **TRIAL**, 5.

1. **CARRIERS—BILL OF LADING — DELIVERY — CONDITIONAL DELIVERY — LIABILITY.** Where defendant ordered a car load of lumber from C. to be shipped east, and C., being unable to fill the order, ordered the lumber from P., who loaded a car and took out and retained possession of a bill of lading in his own name, naming the eastern customer as consignee, and sent an invoice or bill of the lumber to C., the title of the lumber did not pass to C., who was never in possession of the bill of lading; and where P. delivered the bill of lading to plaintiff, a bank, upon plaintiff's agreement to forward the car and collect and guarantee the bill, and plaintiff sent the bill of lading to defendant, together with P's invoice to C., assigned by C. to plaintiff, explaining the circumstances and stating that P. left the bill of lading with plaintiff for collection and that C's instructions were to forward to defendant and pay P. out of defendant's remittance, the defendant, upon retaining the bill and collecting the proceeds on delivery of the lumber, is liable to the plaintiff, who had paid P's bill, in an action on the bill of lading, although defendant notified the plaintiff to look to C.; and defendant's payment to C. is no defense to the action, since C's invoice was not a sale or evidence of a sale, and the title to the lumber remained in P. until he surrendered the bill of lading, and the defendant had notice of P's intention to make delivery of the lumber conditional on payment of its price. *Security State Bank v. O'Connell Lumber Co.*..... 506
2. **CARRIERS—DISCRIMINATION—ACTION FOR DAMAGES — COMPLAINT — SUFFICIENCY.** In an action by a shipper for unjust discrimination by a common carrier, seeking to recover switching charges paid, a complaint alleging that the defendant falsely represented that such charges were paid by other shippers when in fact the defendant was absorbing or itself paying the switching charges of many other shippers, is insufficient where it fails to allege that the defendant had failed to comply with the provisions of the act to regulate commerce with reference to the filing of a schedule of rates and that the rate charge exceeded the rate shown on the schedule. *Lilly Co. v. Northern Pac. R. Co.*..... 589
3. **CARRIERS—LIVE STOCK—CONTRACT AS TO VALUE—LIMITATION OF LIABILITY—STATUTES—PUBLIC POLICY.** Rem. & Bal. Code, § 8648, providing that no contract shall exempt a carrier of live stock from liability that would exist had no contract been entered into, does not invalidate an agreement with the shipper as to the value of the stock and limiting liability to such value; and the same is not void as against public policy when freely and fairly made in consideration of the rate given, a higher valuation being available at a higher rate. *Carstens Packing Co. v. Northern Pac. R. Co.*..... 256

CARRIERS—CONTINUED.

4. **CARRIERS—REGULATIONS—FRANCHISE—FARES—LIMITS OF CITY—EXTENSION.** A franchise limiting the fare that may be charged by a street railway company for a continuous passage between points within the city limits applies to the city limits as they may thereafter be extended by the annexation of new territory. *State ex rel. Dennison v. Seattle, Renton & Southern R. Co.*..... 167
5. **CARRIERS—REGULATION—FRANCHISE—FARES—CHARACTER OF ROAD.** A city may grant a franchise for ordinary street railway service limiting the amount that may be charged for a continuous passage between points within the limits of the city, although the railway was an interurban line; hence, in litigation over the matter, it is not error to refuse to allow its interurban character to be shown. *State ex rel. Dennison v. Seattle, Renton & Southern R. Co.*..... 167

CATTLE:

Trespass by, see **ANIMALS**.

CERTIFICATE:

Tax certificate, see **TAXATION**, 3-9.

CESSATION OF CONTROVERSY:

On appeal, see **APPEAL AND ERROR**, 1.

CHANGE:

In location of route for railroad, see **EMINENT DOMAIN**, 6.

In plans for public improvements, see **MUNICIPAL CORPORATIONS**, 6-8.

In diversion of water by prior appropriator, see **WATERS AND WATER COURSES**, 1.

CHARGE:

To jury in criminal prosecutions, see **CRIMINAL LAW**, 6, 7.

To jury in civil actions, see **TRIAL**, 3-5.

CHILD:

Injury from dynamite caps, see **EXPLOSIVES**.

Contributory negligence of, see **NEGLIGENCE**, 2.

Competency as witness, see **WITNESSES**, 1.

CITIES:

See **MUNICIPAL CORPORATIONS**.

CLAIMS:

Right of assignor to damages for failure of assignee to prosecute suit to collect claims, see **ASSIGNMENTS**.

Right of stockholder to dispute creditors' claims in action by receiver, see **CORPORATIONS**, 15.

Against city, presenting, see **MUNICIPAL CORPORATIONS**, 29-35.

Set-off in action on assigned claim, see **SET-OFF AND COUNTERCLAIM**.

CLASSIFICATION:

- Of city, change in, see MUNICIPAL CORPORATIONS, 1.
- Of cities for purpose of adopting commission form of government, see MUNICIPAL CORPORATIONS, 3.

COLLATERAL ATTACK:

- On authority of officers to dismiss appeal, see CORPORATIONS, 1.
- On franchise, see MUNICIPAL CORPORATIONS, 5.

COLLISION:

- In city street between vehicles or pedestrian and vehicle, see MUNICIPAL CORPORATIONS, 21-23, 25.

COMITY:

- See COURTS, 1.

COMMENCEMENT OF ACTION:

- See LIMITATION OF ACTIONS, 2, 4.

COMMERCE:

- Jurisdiction of state courts, see COURTS, 3.
- Construction of wharf in aid of, see MUNICIPAL CORPORATIONS, 18.
- Extension of street over harbor area in aid of, see NAVIGABLE WATERS, 1.

COMMISSIONERS:

- Authority of to employ alienist to assist prosecuting attorney, see COUNTIES, 1.
- Adoption of commission form of city government, see MUNICIPAL CORPORATIONS, 2-4.

COMMISSION GOVERNMENT:

- Authority to city to adopt as delegation of legislative power, see CONSTITUTIONAL LAW, 1.

COMMISSIONS:

- Of broker, see BROKERS.

COMMON CARRIERS:

- See CARRIERS.

COMMUNITY DEBTS:

- See HUSBAND AND WIFE.

COMMUNITY PROPERTY:

- Devise by mutual wills, see WILLS, 1.

COMPENSATION:

Of broker, see **BROKERS**.

Allowance of counsel fees, see **DIVORCE**.

Of executor or administrator, see **EXECUTORS AND ADMINISTRATORS**, 3.

Of attorney on foreclosure of mortgage and mechanics' liens, see **MORTGAGES**, 9.

COMPETENCY:

Alleging incompetency of fellow servant, see **MASTER AND SERVANT**, 7.

Of witnesses in general, see **WITNESSES**, 1, 2.

COMPETITION:

Seller's agreement not to engage in competing business, see **GOOD WILL**.

COMPLAINT:

In criminal prosecutions, see **CRIMINAL LAW**, 5.

In civil actions, see **PLEADING**.

CONCLUSIVENESS:

Of decrees, in probate, see **EXECUTORS AND ADMINISTRATORS**.

Of judgment, see **JUDGMENT**, 3.

Apportionment of cost of public improvement, see **MUNICIPAL CORPORATIONS**, 10, 11.

Decision of interior department as to heirship of deceased allottee, see **UNITED STATES**.

CONDEMNATION:

Taking or damaging property for public use, see **EMINENT DOMAIN**.

CONDITIONS:

Precedent to issuance of attachment, see **ATTACHMENT**.

Precedent to action against city for tort, see **MUNICIPAL CORPORATIONS**, 35.

CONDUCT:

Conducting election, see **ELECTIONS**.

Argument and conduct of counsel at trial, see **TRIAL**, 1.

CONSENT:

By Indian allottee to sale of lands, see **INDIANS**, 1.

CONSIDERATION:

For seller's agreement not to conduct competing business, see **GOOD WILL**.

CONSTITUTIONAL LAW:

Validity of laws authorizing adoption of commission form of city government, see **MUNICIPAL CORPORATIONS**, 2-4.

Extension of city streets over harbor area, see **NAVIGABLE WATERS**, 1.

Enactment and validity of statutes, see **STATUTES**.

CONSTITUTIONAL LAW—CONTINUED.

Curative and retroactive laws relating to commercial waterway districts, see **WATERS AND WATER COURSES**, 6.

Cross-examination of accused as to former conviction as denial of fair trial, see **WITNESSES**, 6.

1. **CONSTITUTIONAL LAW—LEGISLATIVE POWER—DELEGATION—MUNICIPAL CORPORATIONS.** Laws 1911, p. 521, authorizing the adoption of the commission form of city government, is not an unwarranted delegation of legislative power, in violation of Const., art. 2, § 1, since it is complete in itself and may properly leave to a local board the determination of when or whether it will go into operation. *State ex rel. Hunt v. Tausick*..... 69
2. **CONSTITUTIONAL LAW—DUE PROCESS OF LAW—TAKING PROPERTY—WHARF IN EXTENSION OF STREET—DAMNUM ABSQUE INJURIA.** Where a plat of city tide lands and harbor area showed the dedication of a street as a "city slip," giving the public as much right to use the same as property owners, the construction by the city of a gridiron wharf for public use in that portion of the street extending across the harbor area is not a taking or damaging of private property of abutters who had previously leased from the state the harbor area abutting on such portion of the street, for the purpose of maintaining docks and wharves in aid of commerce and navigation; any inconvenience suffered in the use of improvements thereon being *damnum absque injuria*. *Chlopeck Fish Co. v. Seattle*..... 315

CONSTRUCTION:

Of laws relating to boundary and division fences, see **ANIMALS**.

Of laws permitting transfer of mining claim to corporation in payment of capital stock, see **CORPORATIONS**, 7.

Of statutes relating to dismissal of criminal prosecutions, see **CRIMINAL LAW**, 1, 3.

Statutes of eminent domain, see **EMINENT DOMAIN**, 1.

Of statutes regulating sale of liquors, see **INTOXICATING LIQUORS**.

Of statute providing for filing of affidavit of prejudice, see **JUDGES**.

Of statute defining libel, see **LIBEL AND SLANDER**.

Of deed reserving timber on land conveyed, see **LOGS AND LOGGING**, 1.

Of note and mortgage as to time for payment of interest, see **MORTGAGES**, 2.

Of statute requiring corroboration of evidence, see **RAPE**, 1.

Agreement as sale or option, see **SALES**, 1.

Of statute giving treble damages for cutting timber, see **TRESPASS**.

CONTRACTS:

See **BILLS AND NOTES**; **CARRIERS**; **CORPORATIONS**, 2-4, 6, 17; **COVENANTS**; **INSURANCE**; **MUNICIPAL CORPORATIONS**, 6-9; **SALES**.

Action in contract or tort, joinder of, see **ACTION**, 2.

Employment of alienist to assist prosecuting attorney, see **COUNTIES**, 1.

CONTRACTS—CONTINUED.

Jurisdiction of action between nonresidents on contract made in foreign state, see **COURTS**, 1. 2.

Right to offset expense of treatment upon failure to cure plaintiff under agreement given in consideration for release, see **DAMAGES**, 3.

Damages for breach, see **DAMAGES**, 7.

Parol evidence to vary or explain, see **EVIDENCE**, 5.

Agreements within statute of frauds, see **FRAUDS, STATUTE OF**.

Validity of seller's agreement not to conduct competing business, see **GOOD WILL**.

Restraining performance or breach, see **INJUNCTION**.

Leases, see **LANDLORD AND TENANT**.

Agency, see **PRINCIPAL AND AGENT**.

Validity of agreement for use of water in consideration of grant of way for ditch, see **PUBLIC LANDS**, 2.

Filling tide lands, see **PUBLIC LANDS**, 3.

Reformation, see **REFORMATION OF INSTRUMENTS**.

Right to offset demand in action on, see **SET-OFF AND COUNTERCLAIM**.

Specific performance, see **SPECIFIC PERFORMANCE**.

Sales of realty, see **VENDOR AND PURCHASER**.

Laws impairing obligation of, see **WATERS AND WATER COURSES**, 6.

For water, see **WATERS AND WATER COURSES**, 7.

1. **CONTRACTS—BID—ACCEPTANCE—FURTHER WRITING—BREACH.** A bid by a subcontractor, offering to do the carpentry work on a building for a specified price, with a notation "Formal contract to follow," does not constitute a completed contract, although accepted in writing, where it specified no time when the work should be commenced or completed, nor the character of the work or time for payment; and no action lies for its breach where the bidder did not prepare and forward for execution a formal contract embodying such further details as the character of the work required. *Stanton v. Dennis* 85
2. **CONTRACTS—PERFORMANCE—WAIVER OF WRITTEN NOTICE OF EXTRAS.** A provision in a building contract requiring the contractor to give written notice regarding extra work may be waived by an oral agreement to pay for the same as extra work, or by a course of conduct regarding changes from the plans. *Gehri & Co. v. Dawson* 240
3. **CONTRACTS — PERFORMANCE — DEMURRAGE — QUESTION FOR JURY.** Where a technical compliance with the terms of a building contract with reference to changes has been waived by the owner and changes from the plans have been made by oral agreement, it is for the jury to say whether the changes and extra work warranted an extension of the time for the completion of the work so as to avoid demurrage charges. *Gehri & Co. v. Dawson*..... 240

CONTRADICTION:

Of witness, see **WITNESSES**, 5.

CONTRIBUTORY NEGLIGENCE:

Of servant, see MASTER AND SERVANT, 19, 20, 25, 26.

Of minors injured by dynamite caps, see NEGLIGENCE, 2.

In using horse warranted to be gentle, see SALES, 3.

CONVEYANCES:

Alteration of, see ALTERATION OF INSTRUMENTS.

Mortgaged property, see MORTGAGES.

Reformation of, see REFORMATION OF INSTRUMENTS.

CONVICTION:

Cross-examination of accused as to former conviction, see WITNESSES, 6.

CORPORATIONS:

See MUNICIPAL CORPORATIONS.

Cessation of controversy on appeal by, from order appointing receiver, see APPEAL AND ERROR, 1.

Right of foreign corporation to maintain action on contract made by nonresidents in foreign state, see COURTS, 2.

Acquisition of property by condemnation, see EMINENT DOMAIN.

Delivery of mining stock in escrow as option for sale, see SALES, 1.

1. CORPORATIONS—DIRECTORS—TITLE TO OFFICE—COLLATERAL ATTACK. Directors of a foreign corporation who have taken the oath of office and entered upon their duties are *de facto* officers, and entitled to dismiss an appeal taken by the corporation; and their authority cannot be collaterally impeached by the fact that they had not filed a written acceptance of their trust, as required by the laws of the state where incorporated. *Young v. Schenck*..... 90
2. CORPORATIONS—OFFICERS—AUTHORITY—EVIDENCE. Authority to the president and secretary of a corporation to enter into a lease may be shown by parol as well as by minutes of the board of trustees, where no minutes were necessary. *Starwich v. Washington Cut Glass Co.* 42
3. CORPORATIONS—CONTRACTS—ACCEPTANCE OF LEASE—LANDLORD AND TENANT. A corporation accepts a lease and is liable for the rent, where the trustees authorized the officers to enter into it, the lease was delivered to the officers, who accepted it on behalf of the corporation, and directed that rents received from tenants in possession be applied upon the rent reserved in the lease. *Starwich v. Washington Cut Glass Co.*..... 42
4. SAME—REQUIREMENTS OF BY-LAWS. A formal act of the trustees, required by the by-laws, is not essential to bind the corporation by a lease executed by the officers pursuant to the assent and previous authority of all the trustees, constituting all of the stockholders. *Starwich v. Washington Cut Glass Co.*..... 42

CORPORATIONS—CONTINUED.

5. CORPORATIONS—REPRESENTATION BY OFFICERS—APPEAL—DISMISSAL. An appeal by a corporation will be dismissed on motion of a majority of its executive committee, in whom the management of its affairs is vested subject to revision by the directors, where it appears that all the directors and members of the executive committee save the president desire it, and a majority of the committee so expressed themselves at a meeting, though a formal resolution was not adopted. *Young v. Schenck*..... 90
6. CORPORATIONS — REPRESENTATIONS — CONTRACTS — AUTHORITY OF AGENT—EVIDENCE—SUFFICIENCY. The foreman in charge of a large ranch belonging to a corporation had authority to purchase an engine and hay baler, where it appears that he managed the ranch, employed laborers and purchased supplies, and pending the negotiations, the president of the corporation was called over the telephone to discuss the terms of sale and informed the seller's agent that if the deal was satisfactory to the foreman it would be satisfactory to the company. *Adams County Mercantile Co. v. Walla Walla Livestock Co.*..... 285
7. CORPORATIONS—CAPITAL STOCK—SUBSCRIPTIONS—MINING COMPANY —STATUTES—CONSTRUCTION. Rem. & Bal. Code, § 7347, permitting mining claims to be transferred to such corporation in full payment of the capital stock without the necessity of stock subscriptions, does not apply to coal mining companies, the stockholders of which are accordingly liable to creditors upon unpaid stock subscriptions as provided by Const., art. 12, § 4, and Rem. & Bal. Code, § 3698. *Davies v. Ball*..... 292
8. SAME—INCORPORATORS—IMPLIED CONTRACT OF SUBSCRIPTION. Incorporators of a corporation who accept stock without fully paying up for the same, are liable to creditors upon an implied subscription for the stock although no express contract was made by them. *Davies v. Ball*..... 292
9. CORPORATIONS—STOCK—SUBSCRIPTIONS—PAYMENT—PROPERTY OVERVALUED—INCORPORATORS. Where incorporators accepted fully paid up stock in a coal mining company knowing that it was issued in exchange for property taken at an overvaluation, they are liable to creditors upon stock subscriptions to the extent of the amount unpaid thereon. *Davies v. Ball*..... 292
10. CORPORATIONS — STOCK — UNPAID SUBSCRIPTIONS — ACTIONS — DEFENSES—NOTICE OF OVERVALUATION—ESTOPPEL. In an action by a receiver on behalf of creditors to recover for unpaid stock subscriptions upon stock issued in return for property taken at an overvaluation, a creditor who dealt with the corporation with knowledge that the stock was issued for property of less value than the par value of the stock, is estopped to participate in the fund or seek enforcement of the liability. *Davies v. Ball*..... 292

CORPORATIONS—CONTINUED.

11. CORPORATIONS — STOCK — BONA FIDE PURCHASER — LIABILITY FOR STOCK SUBSCRIPTIONS. The purchaser of stock in a coal mining company at about one-half its par value, is not liable to creditors upon an unpaid stock subscription where the stock on its face was issued as fully paid and nonassessable, the purchaser had no notice that it was not fully paid, and acted in good faith, the presumption being that he was a *bona fide* purchaser. *Davies v. Ball*..... 292
12. SAME. A stockholder who advanced money for the corporation and demanded and received stock in return, issued as fully paid up stock, is not liable to creditors upon an unpaid stock subscription thereon, where he had no notice that it had been issued originally in return for property received at an overvaluation; and the fact that it was returned to the company as treasury stock does not put him on notice of such overvaluation. *Davies v. Ball*..... 292
13. SAME. The *bona fides* of a purchase of stock by one advancing money for the corporation is not affected by the fact that indebtedness was subsequently incurred upon the purchaser's representations. *Davies v. Ball*..... 292
14. SAME — BONA FIDE PURCHASERS — PAYMENT IN SERVICES — GOOD FAITH. Persons receiving large blocks of stock in a coal mining company for services rendered in selling a much smaller amount of stock, are put upon inquiry as to the fact that the stock was not fully paid up, and it is incumbent upon them to show that they purchased for value and in good faith, in order to avoid liability to creditors upon unpaid stock subscriptions. *Davies v. Ball*..... 292
15. CORPORATIONS—INSOLVENCY—STOCKHOLDERS—LIABILITY ON UNPAID SUBSCRIPTIONS — RECEIVER'S SUIT — ORDER — DEFENSES — DISPUTING CLAIMS. An *ex parte* order fixing the amount necessary to pay the debts of an insolvent corporation, and directing the receiver to recover the same from stockholders on their unpaid stock subscriptions, is not binding upon stockholders as to the amount or validity of the claims of the creditors; and in the receiver's following action upon an unpaid stock subscription to recover such sum, the stockholder is entitled to dispute the claims of creditors, and reduce the amount of his liability accordingly. *Grady v. Graham*..... 436
16. CORPORATIONS—STOCKHOLDERS — LIABILITY FOR DEBTS — WAIVER — CORPORATE BONDS. Since a corporate creditor may waive his right to enforce the stockholder's liability, unpaid stock subscriptions cannot be collected to pay corporate bonds which provide that there shall be no recourse to stockholders for the payment of the bonds or any interest thereon. *Grady v. Graham*..... 436
17. CORPORATIONS—STOCK—CONTRACTS—SPECIFIC PERFORMANCE. There can be no specific performance of a contract made by a stockholder for the issuance of corporate stock to him in exchange for property

CORPORATIONS—CONTINUED.

where the corporation had no unissued stock and was not authorized to issue any more. *Smith v. Flathead River Coal Co.*..... 642

18. **CORPORATIONS—FOREIGN CORPORATIONS—RIGHT TO SUE—PAYMENT OF LICENSE.** Rem. & Bal. Code, § 3715, providing that no corporation shall maintain any suit in this state without alleging and proving that it has paid its annual license fee, applies to a suit by a foreign corporation which had for several years maintained a marine superintendent at a port in this state whose duty it was to attend to the upkeep and maintain crews for three ocean-going steamships owned by plaintiff and entering such port. *Boston Tow Boat Co. v. Session Co.* 375

CORROBORATION:

Of female in prosecution for rape, see **RAPE**.

COSTS:

Apportionment of cost of public improvement, see **MUNICIPAL CORPORATIONS**, 7, 10.

For filling tide lands, see **PUBLIC LANDS**, 3.

Inclusion of cost items in certificate, see **TAXATION**, 8.

CO-TENANCY:

See **TENANCY IN COMMON**.

COUNCIL:

See **MUNICIPAL CORPORATIONS**, 1.

COUNTERCLAIM:

See **SET-OFF AND COUNTERCLAIM**.

COUNTIES:

Duty of vendor to take out license for steamboat in each county where liquor is sold, see **INTOXICATING LIQUORS**.

1. **COUNTIES—COUNTY COMMISSIONERS—CONTRACTS—AUTHORITY—EMPLOYMENT OF ALIENIST TO ASSIST PROSECUTING ATTORNEY.** Under Rem. & Bal. Code, § 3890, conferring upon county commissioners the general management of county expenditures and business, they have authority to employ an alienist when his services are necessary to aid the prosecuting attorney in connection with the defense of insanity in a prosecution for homicide; and such employment is not unauthorized as relating only to judicial business. *Williamson v. Snohomish County* 233
2. **COUNTIES—INDEBTEDNESS—BONDS—SUBMISSION TO VOTERS—VALIDITY—DISTINCT OR CONNECTED PROPOSITIONS.** An election to authorize a bond issue may be submitted to the voters of a county as a single proposition, requiring one affirmative or negative vote, although it is proposed to raise four specified sums for distinct parts of the

COUNTIES—CONTINUED.

project—(1) the excavation of a canal from waters to the north of a harbor, (2) the deepening of a river to the south of the harbor, (3) the diversion of the waters of another tributary river, and (4) the erection of wharves and docks in aid or furtherance of the improvement—where it appears that all four parts are related, and in fact one general project for the creation of a great harbor and the utilization and uniting of the waters in and about it. *Blaine v. Hamilton* 353

3. SAME—SUBMISSION—RESOLUTION. A resolution for the submission of a county bond issue is not illegal as combining several purposes in the conjunctive and disjunctive, from the fact that it recites that the money is to be expended for the specified purposes and other rights and interests necessary to the improvement or of securing the drainage or public interests to be derived therefrom, where the other matters referred to were but details in carrying out the enterprise. *Blaine v. Hamilton*..... 353

4. SAME—VALIDATING ACT. A bond issue in a specified sum for deepening the channel of a river “along the lines” laid out by Commercial Waterway District No. 1, and in a specified sum for diverting the waters of a river “along lines” adopted by Commercial Waterway District No. 2, is not invalid as being in aid of such districts, and beyond the authority of Laws 1911, p. 3, which declared such purposes to be county purposes, and validated bonds theretofore authorized within one year next prior to the taking effect of the act, and where the bonds would be authorized if the act be given only such force as it would have had if it had been a law when the bonding question was submitted. *Blaine v. Hamilton* 353

COURTS:

Review of decisions, see APPEAL AND ERROR.

Jurisdiction to accept bail pending appeal, see BAIL.

Power to determine necessity for condemnation, see EMINENT DOMAIN, 9.

Judges, see JUDGES.

1. COURTS—JURISDICTION—SUBJECT-MATTER — LANDS — COMITY. It is discretionary for the courts of this state to refuse, on the doctrine of comity, to assume jurisdiction of an action between nonresidents, upon a contract made and to be performed in the state of their residence, where the action involves only the title to real property in such state, especially where a similar action had been commenced and was voluntarily dismissed in such state, and there would be no way of enforcing a judgment in this state, no damages or alternative judgment being asked. *Olympia Mining and Milling Co. v. Kerns* 545

2. SAME—ACTION BY FOREIGN CORPORATION. A foreign corporation would have no more right than any other party to maintain such

COURTS—CONTINUED.

an action by reason of its having filed articles in this state and complied with our laws. *Olympia Mining and Milling Co. v. Kerns* 545

3. **COURTS—JURISDICTION — COMMERCE — CARRIERS — DISCRIMINATION.** The state courts have jurisdiction of an action brought by a shipper to recover for unjust discrimination by a common carrier engaged in interstate commerce, in violation of the act of Congress regulating interstate commerce, in view of § 22 of the act (U. S. Comp. Laws 1901, p. 3170) providing that nothing in the act shall abridge existing common law remedies; since the right existed at common law. *Lilly Co. v. Northern Pac. R. Co.* 589

COVENANTS:

1. **COVENANTS—WARRANTY—BREACH.** An action for breach of covenants of warranty lies where the defendant had previously sold the timber on the land to a third person, and the plaintiff was deceived and had no notice thereof, and did not know that the timber was being removed until it was gone; and it is no defense that the plaintiff was in possession as a *bona fide* purchaser with superior title, since the trespass and taking of the timber were by authority of the defendant; the covenant of warranty being broken on the delivery of the deed. *Thomas v. West & Wheeler* 344

CREATION:

Of easement, see **EASEMENTS**.

CREDIBILITY:

Of witness, see **WITNESSES**, 5.

CREDITORS:

Liability to on unpaid stock subscriptions, see **CORPORATIONS**, 7-15.
Subrogation to rights of creditor, see **SUBROGATION**.

CRIMINAL LAW:

See **ADULTERY**; **HOMICIDE**; **RAPE**.

Fixing bail in criminal actions, see **BAIL**.

Violation of law prohibiting excessive speed on highway, see **HIGHWAYS**.

Violation of liquor laws, see **INTOXICATING LIQUORS**.

Sufficiency of title of criminal statute, see **STATUTES**, 4.

Cross-examination of accused as to former conviction, see **WITNESSES**, 6.

1. **CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL—STATUTES — CONSTRUCTION.** Rem. & Bal. Code, § 2314, providing for the dismissal of a criminal prosecution by order of court and that no prosecuting attorney shall discontinue or abandon a prosecution except as therein provided, construed in connection with § 2315, providing

CRIMINAL LAW—CONTINUED.

that a dismissal of a misdemeanor or gross misdemeanor under § 2314 shall bar another prosecution charging the same offense, refers only to dismissals where the expressed purpose of the prosecuting attorney is to abandon a prosecution; and not where a motion to dismiss is made because of a variance between the charge and the proof and leave is asked to file a new information, under § 2316, providing that no dismissal on the ground of a variance shall bar another prosecution for the same offense. *State v. Poole*.. 47

2. CRIMINAL LAW—FORMER JEOPARDY—IDENTITY OF OFFENSES CHARGED. The dismissal of a prosecution for the violation of the adulterated food act, Rem. & Bal. Code, § 5455, charging the selling of decomposed veal, does not bar another prosecution for the violation of a disjunctive clause of the same section charging the sale of the product of a calf which died otherwise than by slaughter; since the offense charged was not the same, within Id., § 5314, providing that a dismissal shall bar a prosecution where the same offense was charged in the second prosecution. *State v. Poole*. 47
3. CRIMINAL LAW—FORMER JEOPARDY—DISMISSAL—VARIANCE—“PROOF” AND “EVIDENCE.” Rem. & Bal. Code, § 2316, authorizing a second prosecution after a dismissal of a charge on the ground of a variance between the indictment or information and the proof, does not use the word “proof” in its technical sense as distinguished from “evidence,” and hence applies where the prosecuting attorney moved to dismiss before trial on the ground of a variance between the charge and the “evidence” disclosed to him on interviewing the witnesses and preparing the case. *State v. Poole*.. 47
4. CRIMINAL LAW—APPEAL FROM JUSTICE COURT—DISMISSAL—FAILURE TO PROSECUTE. An appeal from a conviction in justice court should not be dismissed for lack of diligence in prosecuting the appeal for nearly a year, where it appears that defendant had no intention to abandon the appeal or hinder or delay the trial. *State v. Hall* 99
5. CRIMINAL LAW—APPEAL FROM JUSTICE COURT—ERRORS REVIEWABLE—SUFFICIENCY OF COMPLAINT. Upon appeal from a conviction in justice court, the prosecution must be dismissed if the complaint does not state a crime. *State v. Hall*..... 99
6. CRIMINAL LAW—APPEAL—HARMLESS ERROR—INSTRUCTIONS. Upon a charge of murder, an erroneous instruction as to premeditation is harmless where the jury found that there was no premeditation, and convicted defendant of murder in the second degree. *State v. Blaine* 122
7. SAME. On a trial for murder, it is harmless to instruct as to first and second degree assault, which may not be included in the charge, where the defendant requested the instructions, and where the jury found a verdict of murder in the second degree. *State v. Blaine* 122

CROPS:

Damages for loss of, see DAMAGES, 2.
Renting on shares, see LANDLORD AND TENANT, 1.

CROSS-EXAMINATION:

See WITNESSES, 3-6.

CROSSINGS:

Accident at railroad crossing, see RAILROADS, 1.

CURATIVE ACTS:

See STATUTES, 3.
Laws curing defects in commercial waterway district law, see
WATERS AND WATER COURSES, 5, 6.

DAMAGES:

For failure of assignee to prosecute suit to collect claims, see AS-
SIGNMENTS.
For wrongful death, see DEATH.
Community liability for tort of husband, see HUSBAND AND WIFE.
Breach of contract for sale of goods, see SALES, 4, 5.
For wrongful cutting of timber, see TRESPASS.
Instruction as to duty to reduce, see TRIAL, 5.
Breach by vendor of contract for sale of land, see VENDOR AND PUR-
CHASER, 6.

1. DAMAGES—MINIMIZING LOSS—PLEADING—COMPLAINT. A complaint alleging that the plaintiff was prostrate in the woods, sufficiently shows that the aggravation of injuries from defendant's delay in conveying him to the hospital was not due to the neglect of the plaintiff. *Harding v. Ostrander R. & Timber Co.*..... 224
2. DAMAGES—MEASURE OF DAMAGES — FRAUD — LOSS OF CROP. The measure of damages for the loss of a prospective crop through fraud in the sale of seed is the market value of such crop as plaintiff would have raised if the seed had been as represented, less the cost of producing or harvesting not incurred, and less the value, if any, of such crop as was raised from the seed sold; but where the plaintiff had not paid for the seed, the sum due therefor should also be deducted. *Fuhrman v. Interior Warehouse Co.*..... 159
3. DAMAGES — OFFSETS — EXPENDITURES IN TREATMENT — CONTRACT—CONSIDERATION—AVOIDANCE OF RELEASE. Where a release of damages was given to defendant in consideration of an agreement to pay the expense of plaintiff's treatment until he was cured, and plaintiff's injury proves to be permanent and incurable, in an action to recover damages, the defendant cannot offset the sums it had paid out for treatment under its contract to pay for the treatment. *Pattison v. Seattle, Renton & Southern R. Co.*..... 370

DAMAGES—CONTINUED.

4. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$2,500 for personal injuries will not be held excessive, where the plaintiff received a severe contusion on her leg, hip, and side, had been confined to her bed ever since, and there was evidence warranting the jury in finding permanent injury from nervous shock. *Owen v. Seattle*..... 10
5. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for \$300 in favor of a pedestrian, struck by an automobile, is not excessive, where the plaintiff was much bruised, suffered pain, and was ill and unable to attend to business for a considerable time. *Segerstrom v. Lawrence*..... 245
6. DAMAGES—PERSONAL INJURIES—EXCESSIVE VERDICT. A verdict for severe personal injuries will not be set aside as excessive where there was no indication of passion or prejudice, and the discretion of the jury was not abused. *Kalberg v. The Bon Marche*..... 452
7. DAMAGES—EXCESSIVE VERDICT — CARRIERS — BREACH OF CONTRACT. Where plaintiff sued for \$1,950 damages resulting from a sprained knee in being compelled to transfer in the dark at an unsuitable place, and in being kept out all night in a street car in the winter time, a verdict for \$500 will not be set aside as excessive where the testimony of a physician and disinterested parties indicate that the jury was not controlled by passion or prejudice. *Harvey v. Tacoma R. & Power Co.*..... 143

DEATH:

Of party to action ground for abatement, see ABATEMENT AND REVIVAL.

Effect of on consent of allottee to sale of lands, see INDIANS, 1.

1. DEATH—DAMAGES—INSTRUCTIONS. In an action for the wrongful death of a father, leaving a minor daughter, an instruction as to the measure of damages accruing to the daughter until she becomes of age is not erroneous where the language carries with it the implied provision that she shall live until that time. *Neal v. Phoenix Lumber Co.*..... 523
2. DEATH—DAMAGES—EXCESSIVE VERDICT. A judgment of \$13,500 for the death of a millwright, thirty-six years of age, in good health, earning about \$1,400 a year, leaving a widow twenty-six years of age and a daughter seven years of age, is not excessive. *Neal v. Phoenix Lumber Co.*..... 523

DEBT:

Liability on unpaid stock subscriptions for payment of corporate bonds, see CORPORATIONS, 16.

DECEDENTS:

Estates, see EXECUTORS AND ADMINISTRATORS.

Estate of deceased Indian allottee, see UNITED STATES.

Testimony as to transactions with person since deceased, see WITNESSES, 2.

DECISION:

Review of correct decision based on erroneous ground, see APPEAL AND ERROR, 6, 7.

On appeal, see APPEAL AND ERROR, 18, 19.

Of disputes under contract for public improvement, see MUNICIPAL CORPORATIONS, 9.

Of interior department as to heirship of deceased Indian allottee, see UNITED STATES.

DEDICATION:

Of streets in plat across tide lands and harbor area, see NAVIGABLE WATERS, 4.

DEEDS:

Alteration of tax deed, see ALTERATION OF INSTRUMENTS.

Covenants in deeds, see COVENANTS.

Reservation of timber in deed to land, see LOGS AND LOGGING, 1.

Tax deeds, see TAXATION, 10.

Testimony of grantee as evidence of transaction with deceased, see WITNESSES, 2.

DEFAULT:

Judgment by, see JUDGMENT, 1.

In payment of interest, see MORTGAGES, 2, 6.

In contracts to purchase land, see VENDOR AND PURCHASER, 2, 7.

DEFECT:

Curing defect in service of process, see INSANE PERSONS, 1.

In appliances causing injury to servant, see MASTER AND SERVANT, 4.

In franchise ordinance, see MUNICIPAL CORPORATIONS, 5.

In sidewalk causing personal injuries, see MUNICIPAL CORPORATIONS, 26, 27, 29-31.

In engine causing fires, see RAILROADS, 3.

DEGREES:

Harmless error in instructing as to degrees of assault in prosecution for murder, see CRIMINAL LAW, 7.

Instructing as to lesser degree of offense, see HOMICIDE, 5.

DELAY:

Damages for delay in delivering goods, see SALES, 5.

DELEGATION:

To city of legislative powers, see CONSTITUTIONAL LAW, 1.

DELIVERY:

Conditional delivery of goods, see **CARRIERS**, 1.

Of goods sold, see **SALES**, 1, 5.

DEMAND:

By assignee for payment of interest overdue, see **MORTGAGES**, 6.

DEMURRAGE:

On breach of contract, see **CONTRACTS**, 3.

DEMURRER:

Allowing demurrer after answer, see **LIMITATION OF ACTIONS**, 5.

In pleading, see **PLEADING**, 2, 3.

DESCENT AND DISTRIBUTION:

See **EXECUTORS AND ADMINISTRATORS; WILLS**.

Inheriting title to Indian lands, see **INDIANS**.

Decision of interior department as to heirship of deceased allottee,
see **UNITED STATES**.

DILIGENCE:

Failure to prosecute suit on claims assigned for collection, see **ASSIGNMENTS**.

Lack of as ground for dismissal of appeal from justice court, see
CRIMINAL LAW, 4.

Failure to return goods as waiver of right to rescind sale, see **SALES**,
2.

In rescinding contract for fraud as affecting right to performance,
see **SPECIFIC PERFORMANCE**.

In appropriation of waters, see **WATERS AND WATER COURSES**, 2.

DIRECTORS:

Authority to dismiss appeal by corporation, see **CORPORATIONS**, 1, 5.

DISCRETION:

Apportionment of cost of public improvement, see **MUNICIPAL CORPORATIONS**, 10, 11.

DISCRETION OF COURT:

Review of order granting new trial, see **APPEAL AND ERROR**, 8.

To dismiss action or grant nonsuit, see **DISMISSAL AND NONSUIT**.

Vacation of default judgment, see **JUDGMENT**, 1.

Refusing to order bill of particulars, see **PLEADING**, 1.

As to qualification of infant as witness, see **WITNESSES**, 1.

Cross-examination of witness, see **WITNESSES**, 3.

DISCRIMINATION:

In switching charges, see **CARRIERS**, 2.

Jurisdiction of action brought by shipper to recover for, see **COURTS**,
3.

DISMISSAL AND NONSUIT:

Dismissal of appeal, see **APPEAL AND ERROR**, 1, 5.

Right of assignor to damages for assignee's negligence in allowing dismissal of suit on claims assigned for collection, see **ASSIGNMENTS**.

Dismissal of appeal by officers of corporation, see **CORPORATIONS**, 1, 5.

Dismissal of criminal prosecution, see **CRIMINAL LAW**, 1-3.

Dismissal of criminal appeal from justice court, see **CRIMINAL LAW**, 4, 5.

Judgment as bar to another action, see **JUDGMENT**, 3.

At trial, see **TRIAL**, 2.

1. **DISMISSAL AND NONSUIT—VOLUNTARY—TIME FOR—STATUTES.** Under Rem. & Bal. Code, § 408, providing that a plaintiff may take a judgment of nonsuit at any time before the jury retires, it is not an abuse of discretion to grant plaintiff a nonsuit without prejudice after argument upon defendant's challenge to the sufficiency of plaintiff's evidence, and after the court had indicated its view that the evidence was insufficient and had denied plaintiff's request to reopen the case for further evidence. *Williams v. Spokane* 484
2. **DISMISSAL AND NONSUIT—INVOLUNTARY—FAILURE TO PROSECUTE—DISCRETION.** While it is discretionary to dismiss an action for failure to prosecute it diligently, under Rem. & Bal. Code, § 319, it is not an abuse of discretion to refuse to dismiss upon plaintiff's failure to notice it for trial for nearly two years after issues joined, where the plaintiff had not abandoned the action and the defendant might have noticed it for trial, and was, by stipulation, secured the benefit of testimony of a witness who had died in the meantime. *Loving v. Maltbie* 336

DISQUALIFICATION:

Of judges, see **JUDGES**.

DISSOLUTION:

Of attachment, see **ATTACHMENT**.

DISTRICT AND PROSECUTING ATTORNEYS:

Appearance by in proceedings for appointment of guardian, see **INSANE PERSONS**, 2.

DISTRICTS:

Commercial waterway districts, see **WATERS AND WATER COURSES**, 5, 6.

DITCHES:

Grant of right of way for by owner of land, see **WATERS AND WATER COURSES**, 7.

DIVERSION:

Of waters, see **WATERS AND WATER COURSES**, 1, 3, 8.

DIVORCE:

1. **DIVORCE—ALIMONY—ATTORNEY'S FEES — REASONABLENESS.** An allowance of \$25 per month alimony and \$150 attorney's fees is not unreasonable, where it appears that defendant was thirty-six years of age, in good health, engaged in the insurance business, and capable of earning considerable money. *Cooper v. Cooper*..... 219

DOCUMENTS:

Production of, see **EVIDENCE**, 2.

DUE PROCESS OF LAW:

See **CONSTITUTIONAL LAW**, 2.

EASEMENTS:

Grant of by state to city for street over harbor area, see **NAVIGABLE WATERS**, 2.

As affecting title of vendor, see **VENDOR AND PURCHASER**, 3-5.

Water rights, see **WATERS AND WATER COURSES**, 1.

1. **EASEMENTS—CREATION—WAYS OF NECESSITY.** An easement cannot be claimed as a private way of necessity over the lands of another unless there be a dominant and servient estate. *Schulenburg v. Johnstone*..... 202
2. **EASEMENTS — CREATION — PRESCRIPTION — PRIVATE WAYS.** To acquire an easement for a private way by prescription, the travel must be over a uniform route, continuous, and adverse to the owner of the land, at a time when he could object; use of uninclosed lands, which were later fenced, leaving gates or bars as a neighborly accommodation, is not sufficient, showing merely a permissive use. *Schulenburg v. Johnstone*..... 202

ELECTION:

To take under will, see **WILLS**, 1.

ELECTIONS:

For issue of bonds, see **COUNTIES**, 2, 3.

For adoption of commission form of city government, see **MUNICIPAL CORPORATIONS**, 4.

1. **ELECTIONS—CONDUCTING—DUTIES OF OFFICERS — IRREGULARITIES — EFFECT.** Where it does not appear that a fair election has been prevented, an election is not invalidated by reason of the failure of the election officers to observe or comply with the statutory requirements that a certain number of election officers be selected and qualified in a specified manner, that they be present at all times, that they take an oath of office, or that the polls be opened on time and kept open during the time prescribed by law, since the provisions are directory merely. *Murphy v. Spokane*..... 681

ELECTIONS—CONTINUED.

2. **ELECTIONS — CONDUCT — CLOSING POLLS—ACTIONS—PLEADING.** An allegation that by reason of the closing of the polls before the time fixed by law many qualified voters were deprived of the right of voting, is not sufficient to invalidate the election, where it does not appear how long before the closing hour the polls were closed, or that any voters coming to the polls before that time were prevented from voting. *Murphy v. Spokane*..... 681
3. **ELECTIONS — CONDUCT — OFFICERS — PREJUDICE — PAYMENT OF EXPENSE.** The fact that election officers were prejudiced and their appointment influenced by their opinions, and the expense of the election paid by parties interested in the propositions, does not invalidate the election, in the absence of any fraud upon the election itself. *Murphy v. Spokane*..... 681

EMERGENCY:

Acts of servant in emergency, see **MASTER AND SERVANT**, 19.

EMINENT DOMAIN:

Public improvements by municipalities, see **MUNICIPAL CORPORATIONS**, 6-14, 28.

1. **EMINENT DOMAIN—STATUTES — CONSTRUCTION.** Statutes of eminent domain being in derogation of common right, are strictly construed. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court* 189
2. **EMINENT DOMAIN—PROPERTY SUBJECT—STREETS.** A railroad company may condemn a right to lay tracks in a street as against the rights of abutting owners, if it has a lawful franchise to use the street. *State ex rel. Sylvester v. Superior Court*..... 594
3. **EMINENT DOMAIN — USE OF STREETS — EXTENT — PROCEEDINGS — FRANCHISE.** The nature of a railroad's occupancy of a city street is not to be determined by its petition to condemn against the abutter, nor by the order of necessity, but by the terms of the franchise. *State ex rel. Sylvester v. Superior Court*..... 594
4. **EMINENT DOMAIN—NECESSITY FOR ROUTE—TELEGRAPH LINE.** In condemnation proceedings for a telegraph line, the selection of a general route is conclusive as to the necessity of such route, but the issue is presented whether the particular land sought is a necessary part of the general route adopted. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*..... 189
5. **EMINENT DOMAIN — LOCATION — NECESSITY.** The selection by a railroad of a route for a change in its location necessitated by an engineering error makes a *prima facie* case of necessity, which is conclusive in the absence of evidence of a more suitable and less injurious route; and the selection of a street does not show an abuse of power. *State ex rel. Sylvester v. Superior Court*..... 594

EMINENT DOMAIN—CONTINUED.

6. EMINENT DOMAIN—LOCATION—CHANGE. A railroad company may make a change in its location in order to correct an error in engineering, where it was found that high water in a river did not admit of a grade line upon the route as surveyed and adopted; both at common law and by virtue of Rem. & Bal. Code, § 8738 providing for such changes. *State ex rel. Sylvester v. Superior Court*.... 594
7. EMINENT DOMAIN — NECESSITY — EVIDENCE — BURDEN OF PROOF. While the selection of a route is evidence of the highest character of the necessity therefor, the same is overcome by convincing evidence that the land selected is not reasonably necessary to the general route, and that a slight change of location will equally meet the necessity and do less damage to the owner; and in the absence of any rebutting evidence, the condemnation should be refused. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*..... 189
8. EMINENT DOMAIN—NECESSITY—EVIDENCE—ADMISSIBILITY. Where a telegraph company was a trespasser in setting up its poles, the cost of their removal cannot be considered upon an issue as to the necessity of condemning an easement for the line. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*..... 189
9. EMINENT DOMAIN—NECESSITY—DETERMINATION — JUDICIAL QUESTION. Rem. & Bal. Code, § 925, providing that lands may be condemned if the court shall be satisfied by competent proof that the land sought to be appropriated is necessary for the enterprise, invests the court with power to determine whether the specific land sought is necessary in view of the general location or in the event of bad faith or abuse of power in selection. *State ex rel. Postal Telegraph-Cable Co. v. Superior Court*..... 189

EMPLOYEES:

See MASTER AND SERVANT.

ENACTMENT:

Validity and enactment of statutes, see STATUTES.

ENTRY:

Of judgment, see JUDGMENT, 2.

EQUITY:

See REFORMATION OF INSTRUMENTS; SPECIFIC PERFORMANCE.

Review in equitable actions, see APPEAL AND ERROR, 6.

Enjoining invasion of good will under agreement for personal services, see INJUNCTION.

Relief for taxes paid, see TAXATION, 4.

Relief upon default in contract to purchase land, see VENDOR AND PURCHASER, 7.

Restraining diversion of waters, see WATERS AND WATER COURSES, 3, 8.

ESCROWS:

Delivery of mining stock in escrow as option for sale, see SALES, 1.

ESTATES:

Decedents' estates, see EXECUTORS AND ADMINISTRATORS.

Tenancy in common, see TENANCY IN COMMON, 2.

ESTOPPEL:

To allege error, see APPEAL AND ERROR, 10.

Of creditor to enforce liability for stock subscription, see CORPORATIONS, 10.

To attack decree of distribution, see EXECUTORS AND ADMINISTRATORS, 2.

By judgment, see JUDGMENT, 3.

By granting clause as to after-acquired title, see MORTGAGES, 3.

To object to change in plans for improvement, see MUNICIPAL CORPORATIONS, 8.

To object to assessment for public improvement, see MUNICIPAL CORPORATIONS, 14.

By election to take under will, see WILLS, 1.

1. ESTOPPEL—ADMISSIONS—PREJUDICES. A party is not estopped to deny admissions sought to be proven against him, when the statements were not admitted and he claimed that he had signed a paper without reading it or knowing its contents, relying upon another to read it to him, and no one was misled thereby to their disadvantage. *Bardsley v. Truax*..... 400

EVIDENCE:

See ALTERATION OF INSTRUMENTS; RAPE; REFORMATION OF INSTRUMENTS; REPLEVIN; SPECIFIC PERFORMANCE, 1.

Incorporation in record on appeal, see APPEAL AND ERROR, 4.

Review, harmless error in rulings on, see APPEAL AND ERROR, 15-17.

On note, see BILLS AND NOTES, 5.

To show authority of corporate officers, see CORPORATIONS, 2.

To show authority of corporate agent, see CORPORATIONS, 6.

Condemnation proceedings, see EMINENT DOMAIN, 7, 8.

Of acceptance of goods, see FRAUDS, STATUTE OF.

Of incompetency of person, see INSANE PERSONS, 3.

Cancellation of policy, see INSURANCE, 1.

Of fact of nonresidence, see LIMITATION OF ACTIONS, 3.

For injuries to servant in general, see MASTER AND SERVANT, 3, 20, 21, 23-25, 28.

For personal injuries, see MUNICIPAL CORPORATIONS, 21-24.

Denial of new trial on conflict in evidence, see NEW TRIAL.

Agency, see PRINCIPAL AND AGENT, 1.

In action for fires caused by operation of railroad, see RAILROADS, 3-5.

Judicial notice as to population of cities, see STATUTES, 2.

EVIDENCE—CONTINUED.

Of excessive valuation of property, see TAXATION, 2.

Of appropriation, see WATERS AND WATER COURSES, 2.

Of election to take under will, see WILLS, 1.

Competency, attendance, credibility and examination of witnesses, see WITNESSES.

1. EVIDENCE—JUDICIAL NOTICE. The courts will take judicial notice of the practice of spouses in this state to make mutual wills of community property. *Prince v. Prince*..... 552
2. EVIDENCE—PRODUCTION OF DOCUMENTS—SUBPOENA DUCES TECUM. A subpoena *duces tecum* requiring the plaintiff and its attorneys to produce all letters and telegrams passing between it and certain agents respecting the sale of the goods in suit, is sufficiently particular to empower the court to compel plaintiff's attorneys, to whom letters were delivered, to produce them. *Interstate Engineering Co. v. Archer*..... 629
3. EVIDENCE—PAROL EVIDENCE—STREET RAILWAY FRANCHISE—EXPLANATION. An unambiguous franchise limiting the fare that may be charged by a street railway company for a continuous passage between points within the city limits cannot be varied or explained by parol evidence of a contemporaneous agreement that the limitation should not apply to territory that might thereafter be annexed to the city. *State ex rel. Dennison v. Seattle, Renton & Southern R. Co.* 167
4. EVIDENCE—ORAL EVIDENCE—TO VARY RECORD—PROCEEDINGS OF BOARD. When the record of a board of public works consisted of a written notice stating that it had decided to revoke a permit to build a stable and fixed a date in the future for a hearing thereon, it cannot be contradicted by parol evidence that the board revoked the permit at the time of giving the notice. *State ex rel. Grimmer v. Spokane* 388
5. EVIDENCE—PAROL EVIDENCE TO VARY WRITING—ADMISSIBILITY—INCOMPLETE WRITINGS. Where a letter acknowledges receipt of an order for structural iron, and states the price, kind of material, manner of shipment, and terms of payment, but does not state the quantity of material or when it is to be delivered, the whole contract is not stated, and oral evidence as to the time when the iron was agreed to be delivered is admissible. *Interstate Engineering Co. v. Archer*..... 629
6. EVIDENCE—EXPERTS—HYPOTHETICAL QUESTIONS—BASIS—INFERENCES. An inference from established facts that a spark had been thrown from a locomotive engine, and set fire to a house 85 to 100 feet from the track, may properly be made the basis of a question to an expert as to whether the spark arrester was in good condition. *Overacker v. Northern Pac. R. Co.*..... 491

EXAMINATION:

Of expert witnesses, see EVIDENCE, 6.
Of witnesses in general, see WITNESSES.

EXCEPTIONS:

Necessity for purpose of review, see APPEAL AND ERROR, 3.

EXCEPTIONS, BILL OF:

Necessity for purpose of review, see APPEAL AND ERROR, 4.

EXCESSIVE DAMAGES:

See DAMAGES, 4-7.
For wrongful death, see DEATH, 2.

EXCESSIVE VALUATION:

See TAXATION, 2.

EXCUSE:

For failure to file claim against city, see MUNICIPAL CORPORATIONS, 29, 30.
For failure to state residence in claim for injuries, see MUNICIPAL CORPORATIONS, 34.

EXECUTION:

Of mortgage, see MORTGAGES, 1.

EXECUTORS AND ADMINISTRATORS:

Survival of action to on death of party, see ABATEMENT AND REVIVAL.
Necessary parties to probate proceedings on estate of Indian allottee, see INDIANS, 2.
Probate of foreign will, see WILLS, 2.

1. EXECUTORS AND ADMINISTRATORS—DECREE OF DISTRIBUTION — CONCLUSIVENESS—AS CONSTRUCTION OF WILL. A final decree of distribution in probate, setting off half of the property as the community property of the widow, and passing half to the distributees in the will, is conclusive if unappealed from, and cannot be collaterally attacked by showing that the property was the separate property of the deceased and that all passed under the will. *Alaska Banking & Safe Deposit Co. v. Noyes*..... 672
2. EXECUTORS AND ADMINISTRATORS — DISTRIBUTION — ESTOPPEL—ASSENT TO PROCEEDINGS. Where a final decree of distribution was entered in 1903, setting aside the undivided half of the property to the widow as her community property, and the other half to the devisees named in the will, all notices having been given and its integrity not questioned until 1910, parties and third persons dealing with it on the faith of the record are estopped to defeat intervening equities by the claim that it was the separate property of the deceased and as such subject to restrictions in the will, in view of the

EXECUTORS AND ADMINISTRATORS—CONTINUED.

presumption that property standing in the name of married persons is community property. *Alaska Banking & Safe Deposit Co. v. Noyes* 672

3. **EXECUTORS AND ADMINISTRATORS—FINAL ACCOUNT—ALLOWANCE OF COMPENSATION — EFFECT OF NOTICE — DECREE — FINALITY—VACATION.** An order in probate upon the statutory published notice, settling the executor's final account and fixing the amount of his compensation at a sum in excess of the statutory allowance, is within the jurisdiction of the court, and if erroneous is reviewable on appeal as a final judgment; hence it cannot be vacated in the court below for error except upon a proper showing; and it is not sufficient that an applicant for the vacation of the decree alleges that she had no actual notice of the hearing for final settlement, where she had notice of the decree in ample time to have appealed therefrom. *In re Doane's Estate*..... 303

EXEMPTIONS:

From taxation, see **TAXATION**, 1.

EXPENSES:

Payment of expenses of election by interested parties, see **ELECTIONS**, 3.

EXPERT TESTIMONY:

In civil actions, see **EVIDENCE**, 6.

EXPLOSIVES:

See **NEGLIGENCE**, 2.

1. **EXPLOSIVES—NEGLIGENCE—PERSONAL INJURIES—INSTRUCTIONS.** In an action for negligence in leaving dynamite caps and fuse where small boys could obtain them, an instruction correctly defining the degree of care required is not objectionable as presenting no issue of fact, nor because it leaves the jury to determine whether the caps and fuse were attractive to children of tender years. *Tibbits v. Spokane* 570

EXTENSION:

Of city limits as affecting fare charged by street railway company, see **CARRIERS**, 4.

Of streets over harbor area, see **NAVIGABLE WATERS**.

FACTS:

Assumption of in instruction to jury, see **TRIAL**, 3.

Statement of to jury in instruction, see **TRIAL**, 4.

FARES:

Franchise limiting fare charged by street railway company, see **CARRIERS**, 4, 5.

FEEES:

Of attorneys, see MORTGAGES, 9.

Including attorney's fees in tax certificate, see TAXATION, 8.

FELLOW SERVANTS:

See MASTER AND SERVANT, 5, 7, 8, 10-12.

FENCES:

Boundary and partition fences, see ANIMALS.

FILING:

Affidavit of prejudice, see JUDGES.

Filing complaint as commencement of action within time limited,
see LIMITATION OF ACTIONS, 4, 5.

Claims against city for injuries, see MUNICIPAL CORPORATIONS, 29-35.

FINDINGS:

Review on appeal, see APPEAL AND ERROR, 3, 11-13.

In action to foreclose lien, see LOGS AND LOGGING, 4.

FIRE INSURANCE:

See INSURANCE.

FIRES:

Caused by operation of railroad, see RAILROADS, 2-5.

FIXTURES:

1. FIXTURES—BUILDINGS—TRADE FIXTURES—LANDLORD AND TENANT.
Mill and camp buildings are removable before the expiration of the
terms as trade fixtures, under a lease for the purpose of a mill
site for a shingle mill. *Welsh v. McDonald*..... 108
2. FIXTURES—LANDLORD AND TENANT. A tenant does not lose the
right to remove trade fixtures before the end of the term by at-
torning to a successor in interest of the landlord, without any no-
tice to quit or termination of the original tenancy. *Welsh v. Mc-*
Donald 108

FLOODS:

Right of riparian owner to flood waters, see WATERS AND WATER
COURSES, 3.

FOOD:

Prosecution for violation of adulterated food act, see CRIMINAL
LAW, 2.

FORECLOSURE:

Of separate liens in single action, see ACTION, 1.

Of loggers' lien, see LOGS AND LOGGING, 4, 5.

Of mortgage, see MORTGAGES, 7-9.

Subrogation of second mortgagee on foreclosure of liens, see SUBROGATION.

Of tax lien, see TAXATION, 3-5, 7-9.

FORFEITURE:

Of insurance, see INSURANCE, 2-4.

Of contract to purchase land, see VENDOR AND PURCHASER, 7.

FORMER ADJUDICATION:

See JUDGMENT, 3.

FORMER JEOPARDY:

Bar to prosecution, see CRIMINAL LAW, 1-3.

FRANCHISES:

To use of street as condition to condemnation of right to lay tracks, see EMINENT DOMAIN, 2, 3.

Parol evidence to explain street railway franchise, see EVIDENCE, 3.

Grant by municipality, see MUNICIPAL CORPORATIONS, 5, 19, 20.

FRAUD:

See BILLS AND NOTES, 5.

Loss of crop through fraud in sale of seed, see DAMAGES, 2.

Of agent, see PRINCIPAL AND AGENT, 3.

Specific performance of contract rescinded on ground of fraud, see SPECIFIC PERFORMANCE.

FRAUDS, STATUTE OF:

Parol license for right of way for ditch, see WATERS AND WATER COURSES, 7.

1. FRAUDS, STATUTE OF — SALE OF PERSONALTY — ACCEPTANCE — EVIDENCE—SUFFICIENCY. An absolute acceptance of an engine and hay baler is shown, sufficient to take an oral sale thereof out of the operation of the statute of frauds (Rem. & Bal. Code, § 5290, requiring a note or memorandum thereof, in writing, etc., unless the purchaser shall accept and receive part of the goods etc.), where it appears that the agent, authorized to purchase the same, received the engine and baler early in June and hauled them to the purchaser's ranch, where they remained, long prior to the commencement of the action, the purchaser knowing that the seller claimed an absolute sale, delivery, and acceptance, the purchaser making no demand for a test thereof as provided for in the contract. *Adams County Mercantile Co. v. Walla Walla Livestock Co.* 285

FUNDS:

Deficiency in sums collected on public improvement, see MUNICIPAL CORPORATIONS, 7.

Creation of sinking fund, see MUNICIPAL CORPORATIONS, 28.

GOOD FAITH:

Of purchaser, see BILLS AND NOTES, 2, 4, 5.

In purchase of corporate stock, see CORPORATIONS, 11-14.

GOOD WILL:

Invasion of under contract for personal services, see INJUNCTION.

1. **GOOD WILL—SALE—CONSIDERATION.** The sale of a butcher business for the fair market value of the personal property, constitutes a good consideration for the seller's accompanying agreement not to engage in such business in the neighborhood for a specified time. *Nelson v. Brassington*..... 180
2. **GOOD WILL—SALE—RESTRAINT OF TRADE—AGREEMENT NOT TO COMPETE—BREACH.** The sale of a butcher business, with an agreement by the seller not to engage in such business within twelve blocks of the location for a period of two years, is not void as against public policy; and is breached by the seller's conducting a competing business as "manager" which he advertised as his own, although he worked on a salary without any financial interest in the business. *Nelson v. Brassington*..... 180

GOVERNMENT:

Adoption of commission form of city government, see MUNICIPAL CORPORATIONS, 2-4.

GRANTS:

Of way for ditch across public lands, see PUBLIC LANDS, 2.

GUARDIAN AND WARD:

Guardianship of insane persons, see INSANE PERSONS.

HARBOR AREA:

Construction of wharf by city in street extension over harbor area, see CONSTITUTIONAL LAW, 2; MUNICIPAL CORPORATIONS, 18.

Extension of streets over, see NAVIGABLE WATERS.

HARMLESS ERROR:

In civil actions, see APPEAL AND ERROR, 14-17.

In criminal prosecution, see CRIMINAL LAW, 6, 7; HOMICIDE, 3.

HEIRS:

Of Indian allottee, see INDIANS.

Decision of interior department as to heirship of deceased allottee, see UNITED STATES.

HIGHWAYS:

Creation of easement for private way, see **EASEMENTS**.

1. **HIGHWAYS—USE—OFFENSES—SPEED OF AUTOMOBILE—COMPLAINT—SUFFICIENCY.** A complaint in justice court charging that defendant, at M. in S. county, drove an automobile at a speed in excess of twenty miles an hour, frightening horses, and unlawfully refused to obey a signal to reduce the speed, is insufficient to charge a violation of Rem. & Bal. Code, § 2531, prohibiting unsafe or unreasonable speed upon a public road or street, or at any other place in excess of twenty-four miles an hour; since it does not charge excessive speed nor any place where twenty miles would be unlawful. *State v. Hall* 99

HOMESTEAD:

Grant of way for ditch as alienation of, see **PUBLIC LANDS**, 2.

HOMICIDE:

Harmless error in instructing jury, see **CRIMINAL LAW**, 6, 7.

1. **HOMICIDE — SELF-DEFENSE — ROBBERY — APPLICATION OF STATUTE.** Rem. & Bal. Code, § 2416, warranting the repulsion of a robbery by force, even to taking life, is not applicable where the deceased was only guilty of a trespass in taking a whiskey bottle away from the accused after learning that the accused had given his son whiskey, and with no intent to commit a robbery. *State v. Blaine* 122
2. **HOMICIDE — SELF-DEFENSE — INSTRUCTIONS.** Where the deceased was shot by the accused just after taking a bottle of whiskey from the accused, upon learning that the accused had given his son whiskey, an instruction as to the law of self-defense in case of a felonious assault is properly qualified by a statement that the rule is different when the attack is not felonious in character, when there is no real or reasonable apprehension of death or great bodily harm. *State v. Blaine*..... 122
3. **HOMICIDE — SELF-DEFENSE — APPEAL — HARMLESS ERROR—INSTRUCTIONS.** An instruction clearly and correctly stating the defendant's right to take life in the defense of person and also of his property against robbery is not prejudicial from the fact that parts of it were not applicable to the facts of the case. *State v. Blaine*.... 122
4. **HOMICIDE—FIRST DEGREE MURDER—INSTRUCTIONS—PREMEDITATION.** It is proper to instruct that premeditation means "thought over beforehand" for any length of time however short, but that no particular space of time need intervene between the intent to kill and the killing. *State v. Blaine*..... 122
5. **HOMICIDE—DEGREES OF OFFENSE—INSTRUCTIONS AS TO LESSER OFFENSES—STATUTES.** Under Rem. & Bal. Code, § 2595, if a homicide is neither excusable nor justifiable, it must at least be manslaughter,

HOMICIDE—CONTINUED.

and the purpose of the code is to do away in homicide with instructions submitting lesser degrees of statutory offenses. *State v. Blaine* 122

HUSBAND AND WIFE:

See DIVORCE.

Adultery, see ADULTERY.

Judicial notice of practice of in making mutual wills of community property, see EVIDENCE, 1.

Rights of survivor, see EXECUTORS AND ADMINISTRATORS.

Execution of mutual wills, see WILLS, 1.

1. HUSBAND AND WIFE—COMMUNITY DEBTS—TORTS OF HUSBAND IN COMMUNITY BUSINESS. The community is liable to a passenger for the tort of the husband in negligently driving an automobile for hire, where the automobile was operated for the benefit of the community. *Milne v. Kane*..... 254

HYPOTHETICAL QUESTIONS:

In examination of expert witness, see EVIDENCE, 6.

IDENTITY:

Of offenses as affecting former jeopardy, see CRIMINAL LAW, 2.

IMPEACHMENT:

Of witness, see WITNESSES, 5.

IMPRISONMENT:

Persons entitled to bail, see BAIL.

IMPROVEMENTS:

Construction of wharf by city in street extension over harbor area, see CONSTITUTIONAL LAW, 2.

Issuance of bonds for, see COUNTIES, 2-4.

Public improvements, see MUNICIPAL CORPORATIONS, 6-14, 18, 28.

IMPUTED NEGLIGENCE:

See NEGLIGENCE, 3.

INCORPORATORS:

Liability on contract of subscription for stock, see CORPORATIONS, 8, 9.

INDEPENDENT CONTRACTORS:

See MASTER AND SERVANT, 28-30.

Opening statement as admitting negligence that of independent contractor, see TRIAL, 2.

INDIANS:

Heirship of deceased allottee, see UNITED STATES.

1. INDIANS—ALIENATION OF LANDS—CONSENT TO SALE—REVOCATION BY DEATH. The written consent of an Indian allottee to the sale of his lands by commissioners, under 27 Stats. at L. 633, is not revoked by his death prior to the sale. *Little Bill v. Swanson*..... 650
2. INDIANS—LANDS—TITLE OF ALLOTTEE—DESCENT—ADMINISTRATION—NECESSARY PARTIES—UNITED STATES. An Indian allottee of lands who, as a citizen of the United States, holds a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a certain period and until removed by legislative act, has a base or qualified fee, which descends upon his death under the laws of descent of the state (made applicable by 24 Stats. at L. 388, § 5), and the United States is not interested in the devolution of title by inheritance and is not a necessary party to proceedings in probate administering the estate. *Little Bill v. Swanson*..... 650
3. INDIANS—LANDS—ACTIONS TO RECOVER—LIMITATION OF ACTIONS—RETROACTIVE STATUTES. 32 Stats. at L. 284, providing that the statutes of limitations of the states shall apply to actions by any Indian patentee, for the possession of lands patented in severalty, where a deed thereof has been approved by the secretary of the interior, the same as for the recovery of land patented to others than Indians, is retroactive, although the lands were not at the time subject to alienation, and the whole period of the limitations need not run after the issuance of the deed by the trustee; especially in view of the added proviso that "this act shall not apply to any suits brought within one year from and after its passage;" hence an action to recover lands in 1905 is barred where the patentee died in 1888, at which time the land immediately went into possession of one claiming as sole heir at law under a decree of the probate court, to the knowledge of the plaintiff. *Little Bill v. Swanson* 650
4. INDIANS—LANDS—ACTIONS TO RECOVER—LACHES. The doctrine of laches is not inapplicable to actions at law for the recovery of lands, and bars an action commenced in 1905 by an Indian who had severed his tribal relations and was a citizen of the United States, and who claimed as heir of an original allottee from the government who died in 1888, where defendant's predecessor in interest was at that time adjudged the sole heir by the probate court, and went into possession, and it appears that plaintiff knew of such possession and claim of heirship and frequently visited there without making any claim to the land at that time, nor later when the interior department made a similar finding as to the heirship and issued deeds upon the consent of such heir, the land having increased in value from \$90 to \$600 per acre, and purchasers in good faith having paid for the lands and made extensive improvements thereon. *Little Bill v. Swanson*..... 650

INDICTMENT AND INFORMATION:

See ADULTERY.

INDORSEMENT:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1-3.

Of note by agent, see **PRINCIPAL AND AGENT**, 2.

INFANTS:

Injury from dynamite caps, see **EXPLOSIVES**.

Contributory negligence of, see **NEGLIGENCE**, 2.

Competency as witnesses, see **WITNESSES**, 1.

INFERENCE:

To sustain pleadings, see **PLEADING**, 2.

INJUNCTION:

Diversion of waters, see **WATERS AND WATER COURSES**, 3, 8.

Enjoining street improvement, see **MUNICIPAL CORPORATIONS**, 12.

1. **INJUNCTION—BREACH OF CONTRACT—PERSONAL SERVICES—ENGAGING IN OTHER EMPLOYMENT.** Breach of a contract to give defendant's personal services in a school of music for a term of years will not be enjoined where the services were not so special or extraordinary that they could not be supplied elsewhere, and another teacher was found to take defendant's place without materially impairing the efficiency of the school. *Columbia College of Music v. Tunberg* 19
2. **SAME—CONTRACT FOR GOOD WILL.** Where a teacher of music was employed to teach in a school for a specified term and agreed not to teach elsewhere and to devote his best efforts to promoting the school, he will be enjoined from soliciting clients of the school and invading its good will during the term, upon his leaving the school and setting up business for himself. *Columbia College of Music v. Tunberg* 19

INSANE PERSONS:

1. **INSANE PERSONS—APPOINTMENT OF GUARDIAN—PROCESS—WAIVER—APPEARANCE.** In proceedings for the appointment of a guardian for an incompetent person, appearance in person and by attorney cures any defect in service of process. *In re Ervay*..... 138
2. **INSANE PERSONS—APPOINTMENT OF GUARDIAN—APPEARANCE BY PROSECUTING ATTORNEY.** Rem. & Bal. Code, § 1624, provides that in proceedings for the appointment of a guardian of an incompetent person, it shall not be necessary for the prosecuting attorney to appear at the hearing, if the incompetent is represented by an attorney of his own selection; hence, in such case, an appearance by the prosecuting attorney is unnecessary. *In re Ervay*..... 138

INDIANS:

Heirship of deceased allottee, see UNITED STATES.

1. INDIANS—ALIENATION OF LANDS—CONSENT TO SALE—REVOCATION BY DEATH. The written consent of an Indian allottee to the sale of his lands by commissioners, under 27 Stats. at L. 633, is not revoked by his death prior to the sale. *Little Bill v. Swanson*..... 650
2. INDIANS—LANDS—TITLE OF ALLOTTEE—DESCENT—ADMINISTRATION—NECESSARY PARTIES—UNITED STATES. An Indian allottee of lands who, as a citizen of the United States, holds a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a certain period and until removed by legislative act, has a base or qualified fee, which descends upon his death under the laws of descent of the state (made applicable by 24 Stats. at L. 388, § 5), and the United States is not interested in the devolution of title by inheritance and is not a necessary party to proceedings in probate administering the estate. *Little Bill v. Swanson*..... 650
3. INDIANS—LANDS—ACTIONS TO RECOVER—LIMITATION OF ACTIONS—RETROACTIVE STATUTES. 32 Stats. at L. 284, providing that the statutes of limitations of the states shall apply to actions by any Indian patentee, for the possession of lands patented in severalty, where a deed thereof has been approved by the secretary of the interior, the same as for the recovery of land patented to others than Indians, is retroactive, although the lands were not at the time subject to alienation, and the whole period of the limitations need not run after the issuance of the deed by the trustee; especially in view of the added proviso that "this act shall not apply to any suits brought within one year from and after its passage;" hence an action to recover lands in 1905 is barred where the patentee died in 1888, at which time the land immediately went into possession of one claiming as sole heir at law under a decree of the probate court, to the knowledge of the plaintiff. *Little Bill v. Swanson* 650
4. INDIANS—LANDS—ACTIONS TO RECOVER—LACHES. The doctrine of laches is not inapplicable to actions at law for the recovery of lands, and bars an action commenced in 1905 by an Indian who had severed his tribal relations and was a citizen of the United States, and who claimed as heir of an original allottee from the government who died in 1888, where defendant's predecessor in interest was at that time adjudged the sole heir by the probate court, and went into possession, and it appears that plaintiff knew of such possession and claim of heirship and frequently visited there without making any claim to the land at that time, nor later when the interior department made a similar finding as to the heirship and issued deeds upon the consent of such heir, the land having increased in value from \$90 to \$600 per acre, and purchasers in good faith having paid for the lands and made extensive improvements thereon. *Little Bill v. Swanson*..... 650

INDICTMENT AND INFORMATION:

See ADULTERY.

INDORSEMENT:

Of bill of exchange or promissory note, see **BILLS AND NOTES**, 1-3.

Of note by agent, see **PRINCIPAL AND AGENT**, 2.

INFANTS:

Injury from dynamite caps, see **EXPLOSIVES**.

Contributory negligence of, see **NEGLIGENCE**, 2.

Competency as witnesses, see **WITNESSES**, 1.

INFERENCE:

To sustain pleadings, see **PLEADING**, 2.

INJUNCTION:

Diversion of waters, see **WATERS AND WATER COURSES**, 3, 8.

Enjoining street improvement, see **MUNICIPAL CORPORATIONS**, 12.

1. **INJUNCTION—BREACH OF CONTRACT—PERSONAL SERVICES—ENGAGING IN OTHER EMPLOYMENT.** Breach of a contract to give defendant's personal services in a school of music for a term of years will not be enjoined where the services were not so special or extraordinary that they could not be supplied elsewhere, and another teacher was found to take defendant's place without materially impairing the efficiency of the school. *Columbia College of Music v. Tunberg* 19
2. **SAME—CONTRACT FOR GOOD WILL.** Where a teacher of music was employed to teach in a school for a specified term and agreed not to teach elsewhere and to devote his best efforts to promoting the school, he will be enjoined from soliciting clients of the school and invading its good will during the term, upon his leaving the school and setting up business for himself. *Columbia College of Music v. Tunberg* 19

INSANE PERSONS:

1. **INSANE PERSONS—APPOINTMENT OF GUARDIAN—PROCESS—WAIVER—APPEARANCE.** In proceedings for the appointment of a guardian for an incompetent person, appearance in person and by attorney cures any defect in service of process. *In re Ervay*..... 138
2. **INSANE PERSONS—APPOINTMENT OF GUARDIAN—APPEARANCE BY PROSECUTING ATTORNEY.** Rem. & Bal. Code, § 1624, provides that in proceedings for the appointment of a guardian of an incompetent person, it shall not be necessary for the prosecuting attorney to appear at the hearing, if the incompetent is represented by an attorney of his own selection; hence, in such case, an appearance by the prosecuting attorney is unnecessary. *In re Ervay*..... 138

INSANE PERSONS—CONTINUED.

3. **INSANE PERSONS—APPOINTMENT OF GUARDIAN — EVIDENCE OF INCOMPETENCY.** A guardian should be appointed for an incompetent person where it appears that she was the victim of designing persons who obtained all her ready cash, and a general power of attorney, and large sums of money, and that her considerable fortune will be taken from her unless her affairs are conducted through the courts. *In re Ervay*..... 138

INSOLVENCY:

Of corporation, see **CORPORATIONS**, 15.

INSPECTION:

Duty to inspect appliances, see **MASTER AND SERVANT**, 3, 4, 15.

INSTRUCTIONS:

Review as dependent on prejudicial nature of error, see **APPEAL AND ERROR**, 14.
 In criminal prosecutions, see **CRIMINAL LAW**, 6, 7; **HOMICIDE**, 2-5.
 In civil actions, see **TRIAL**, 3-5.

INSURANCE:

1. **INSURANCE—CANCELLATION OF POLICY — EVIDENCE — QUESTION FOR JURY.** Upon a direct conflict in the evidence as to whether a fire insurance policy had been cancelled before the fire, the matter depending upon the credibility of the witnesses, the question is for the jury. *Naslund v. Svea Insurance Co.*..... 520
2. **INSURANCE—FIRE INSURANCE—FORFEITURE—WATCHMAN — BREACH OF WARRANTY.** A policy of fire insurance on a reconcentrating plant warranting that whenever the plant is idle, competent watchmen shall be employed and due diligence used to keep a continuous watch day and night in and immediately around certain parts of the plant, is violated and the policy forfeited, where, on shutting down, the insured employed the day and night foreman of a mill situated six to twelve hundred feet distant, paying each one dollar a day for watching intermittently while not engaged in their regular duties as foreman for which they received \$5.50 per day from the other mill, and it appears that the night watchman at the time of the fire had no key and had never been in or near the premises. *Shoshone Concentrating Co. v. Hamburg-Bremen Fire Ins. Co.*... 638
3. **INSURANCE — FIRE INSURANCE — INVENTORY.** A refusal, after repeated demands, to furnish an inventory of goods, damaged but not destroyed, as required by a fire insurance policy, where it might have been done, defeats any action on the policy, although an inventory was furnished later after it was too late to be of any use. *Seattle Merchants Association v. Germania Fire Insurance Co.* 115

INSURANCE—CONTINUED.

4. **SAME—PROOF OF LOSS.** Failure to furnish proofs of loss within the sixty days required by a fire policy, without any excuse for the delay, forfeits all rights under the policy; and it is not a sufficient excuse that the company had been demanding an inventory, required by the policy to be given forthwith, without making specific mention of the proofs of loss. *Seattle Merchants Association v. Germania Fire Insurance Co.*..... 115

INTEREST:

Time for payment, see **MORTGAGES**, 2.

INTOXICATING LIQUORS:

1. **INTOXICATING LIQUORS—SALES WITHOUT LICENSE—STATUTES—CONSTRUCTION.** Under Rem. & Bal. Code, § 6269, providing that any person selling intoxicating liquor on any steamboat shall pay an annual state license fee in addition to the license fee fixed by any city, town or county where such liquor is sold, and Id., § 6263, giving the county commissioners of each county the sole and exclusive authority to regulate the sale of spirituous liquors outside of the corporate limits of a town, a license is required from each county in which the steamboat sells intoxicating liquors; and the same is not excused by a state or by a Federal license. *State v. Falkenstine* 432
2. **INTOXICATING LIQUORS—LICENSE—REASONABLENESS — PROHIBITION.** The requirement that a steamboat secure a county license for the sale of intoxicating liquors in each county through which it passes is not objectionable because it is unreasonable or prohibitory, as the legislature has the right to prohibit the sales. *State v. Falkenstine* 432

INVENTORY:

Of goods damaged or lost by fire, see **INSURANCE**, 3.

IRRIGATION:

Use of waters for, see **WATERS AND WATER COURSES**, 1-4, 7, 8.

JEOPARDY:

Former jeopardy, see **CRIMINAL LAW**, 1-3.

JOINDER:

Of causes of action, see **ACTION**.

Of tenants in action for tort, see **TENANCY IN COMMON**, 1.

JOINT TENANCY:

See **TENANCY IN COMMON**.

JUDGES:

1. **JUDGES—DISQUALIFICATION — AFFIDAVIT OF PREJUDICE — EFFECT — PRACTICE.** An affidavit of prejudice, under Laws 1911, p. 617, § 1, providing that the judge shall forthwith transfer the cause for

JUDGES—CONTINUED.

trial to another judge or court, does not deprive the judge of jurisdiction until it is formally called to his notice, under the practice of bringing pleadings to the attention of the court by notice to the opposite party and notation thereof on the clerk's docket. *State ex rel. Nelson v. Yakey*..... 511

2. SAME—JURISDICTION—NOTICE TO JUDGE. A judge will not be held to have arbitrarily held jurisdiction of a cause after an affidavit of prejudice is filed, when there is a disputed question of fact as to his notice thereof, and the clerk's record shows no notice. *State ex rel. Nelson v. Yakey*..... 511

3. SAME—JURISDICTION—CONSTRUCTION OF STATUTE. On filing an affidavit of prejudice, under Laws 1911, p. 617, the trial judge has jurisdiction to maintain the *status quo* by continuing pending hearings, or setting the date for future hearings; as the statute should not be so construed that it will operate to defeat or delay the progress of a case. *State ex rel. Nelson v. Yakey*..... 511

JUDGMENT:

See REPLEVIN.

Review, see APPEAL AND ERROR.

Dismissal as bar to another prosecution, see CRIMINAL LAW, 1, 2.

Decree of distribution of estate of decedent, see EXECUTORS AND ADMINISTRATORS, 1, 2.

Decree settling final account and fixing executor's compensation, see EXECUTORS AND ADMINISTRATORS, 3.

Priority of notes and mortgage over judgment, see MORTGAGES, 4.

1. JUDGMENT—DEFAULT—VACATION. It is discretionary to open a default judgment against a corporation, where the papers were served upon an officer who was unfamiliar with legal proceedings and mislaid and lost the papers until after entry of the judgment, and the motion was made with diligence. *Spoar v. Spokane Turn-Verein* 208
2. JUDGMENT—ENTRY—CLERK'S MINUTES. The clerk's minute entry of a judgment cannot disturb the judgment. *Michel v. White*.. 341
3. JUDGMENT—RES JUDICATA—DISMISSAL AND NONSUIT. A judgment in an equity case, after trial, dismissing the action on defendant's motion for the reason that the plaintiffs failed to prove any of the material facts necessary to a recovery, is a judgment on the merits, and a bar to another action, regardless of whether it was called a dismissal or a nonsuit. *Michel v. White*..... 341

JUDICIAL NOTICE:

In civil actions, see EVIDENCE, 1.

Population of cities, see STATUTES, 2.

JUDICIAL QUESTION:

Necessity for appropriation of land, see EMINENT DOMAIN, 9.

JURISDICTION:

Appellate, see APPEAL AND ERROR.

Of court to accept bail pending appeal, see BAIL.

Of state courts, see COURTS.

Decedents' estates, see EXECUTORS AND ADMINISTRATORS, 3.

On filing of affidavit of prejudice, see JUDGES.

Jurisdictional defect in application for building permit, see MUNICIPAL CORPORATIONS, 15.

To grant equitable relief for taxes paid, see TAXATION, 4.

JURY:

Instructions in criminal prosecutions, see CRIMINAL LAW, 6, 7.

Instructions in civil actions, see TRIAL, 3-5.

KNOWLEDGE:

As affecting assumption of risks by servant, see MASTER AND SERVANT, 16, 17.

LACHES:

As bar to action for recovery of Indian lands, see INDIANS, 4.

LANDLORD AND TENANT:

Injury to abutting lessees of harbor area by construction of wharf in city street extension, see CONSTITUTIONAL LAW, 2.

Leases by corporations, see CORPORATIONS, 2-4.

Right of tenant to remove buildings as trade fixtures, see FIXTURES.

Assessment of leasehold interest in state lands for local improvement, see MUNICIPAL CORPORATIONS, 13.

Excessive valuation of leasehold, see TAXATION, 2.

1. LANDLORD AND TENANT—CROPPING ON SHARES—TENANCY IN COMMON. A tenancy in common in a crop is created by a lease of land to be cropped under a contract for a specific division of the crop. *Fuhrman v. Interior Warehouse Co.*..... 159
2. LANDLORD AND TENANT—CONDITION OF PREMISES—INJURIES TO THIRD PERSON—LIABILITY. The owner of leased premises is not liable to one visiting an exhibition therein, for injuries caused by snow and ice on an outside stairway landing, where the tenant giving the exhibition was in exclusive possession and control of the premises, including the stairway, and when leased the premises were in safe condition and free from snow and ice. *Spoar v. Spokane Turn-Verein* 208
3. LANDLORD AND TENANT—RENTS—LEASE—ACCEPTANCE. A lessee is liable for rent upon accepting a lease, although it did not go into possession or sign the lease. *Starwich v. Washington Cut Glass Co.* 42

LANDS:

See PUBLIC LANDS.

Indian lands, see INDIANS.

Conclusiveness of question of heirship of deceased Indian allottee, by interior department, see UNITED STATES.

LAW OF THE CASE:

See APPEAL AND ERROR, 18, 19.

LEASES:

See LANDLORD AND TENANT.

LEGISLATIVE POWER:

Delegation of, see CONSTITUTIONAL LAW, 1.

LEGISLATURE:

Enactment of statutes, see STATUTES.

LIBEL AND SLANDER:

1. LIBEL AND SLANDER—PUBLICATION OF PHOTOGRAPH—STATUTES—CONSTRUCTION. The publication of plaintiff's photograph, which was a true likeness and inoffensive in itself, in connection with a story of her father's crime, is not a libel as defined by Rem. & Bal. Code, §§ 2424 and 292, providing that it is a libel to expose any living person to hatred, contempt or obloquy or to deprive him of the benefit of public confidence or social intercourse, and that it is sufficient to allege generally that the publication was of and concerning the plaintiff, without alleging extrinsic facts showing the application of the matter; since the photograph did not make the article "of and concerning" the plaintiff. *Hillman v. Star Publishing Co.* 691

LICENSES:

Payment of by foreign corporation before suit, see CORPORATIONS, 18.

For sale of intoxicating liquors, see INTOXICATING LIQUORS.

Permission to maintain ditch, see WATERS AND WATER COURSES, 7.

LIENS:

Joinder of in single action, see ACTION, 1.

Loggers' liens, see LOGS AND LOGGING.

Mortgage lien, see MORTGAGES.

Tax lien, see TAXATION.

For taxes paid, see TAXATION, 4, 6.

LIMITATION OF ACTIONS:

As bar to action to recover Indian lands, see INDIANS, 3.

Vacation of tax deed, see TAXATION, 10.

1. LIMITATION OF ACTIONS—BETWEEN NONRESIDENTS. Under Rem. & Bal. Code, § 178, a right of action arising in another state between

LIMITATION OF ACTIONS—CONTINUED.

nonresidents of this state, is not barred when it is not barred by the statutes of the state where it arose. *McElroy v. Gates*..... 249.

2. **LIMITATION OF ACTIONS—LAWS OF OTHER STATE—NONRESIDENTS.** Rev. Stat. of Missouri, 1909, § 1897, providing that if, when an action accrues against a resident of such state, he be absent therefrom, such action may be commenced within the time limited therefor after the return of such person to the state, only applies to persons who are residents of the state of Missouri when the action accrues. *McElroy v. Gates*..... 249

3. **LIMITATION OF ACTIONS—ACCRUAL IN OTHER STATE—FACT OF NON-RESIDENCE—BURDEN OF PROOF—EVIDENCE—SUFFICIENCY.** Where a resident of Missouri made a note, and left the state before its maturity, and claims that the note is now outlawed by the laws of such state because he was not a resident of the state at the time it accrued, it is incumbent upon him to prove his nonresidence at such time; and it is not sufficient to show that when the note matured he was roving about outside of the state with no fixed abode, the presumption being that he was temporarily absent and a resident of Missouri until he established a residence elsewhere. *McElroy v. Gates* 249

4. **LIMITATION OF ACTIONS—COMMENCEMENT OF ACTIONS—FILING COMPLAINT.** An action is barred by the statute of limitations, where the complaint was duly served but was not filed, so as to commence the action within the time limited, under Rem. & Bal. Code, § 167, providing that the action is not commenced so as to toll the statute, until the complaint is filed. *Petree v. Washington Water Power Co.* 636

5. **LIMITATION OF ACTIONS—PLEADING—SUPPLEMENTAL PLEADINGS—DEMURRER AFTER ANSWER.** Under Rem. & Bal. Code, § 308, authorizing supplemental pleadings to show facts occurring after issue joined, it is proper to allow defendant to withdraw an answer and demur on the ground that the complaint was not filed within time to toll the statute of limitations, where the objection was not available at the time the issue was made up. *Petree v. Washington Water Power Co.*..... 636

LIMITATION OF LIABILITY:

Of carrier of live stock, see **CARRIERS**, 3.

LIVE STOCK:

Carriage of, see **CARRIERS**, 3.

LOCATION:

Of route for telegraph line, see **EMINENT DOMAIN**, 4-9.

LOGS AND LOGGING:

Mill and camp buildings as trade fixtures, see **FIXTURES**.

1. **LOGS AND LOGGING—TIMBER—DEEDS—RESERVATION—CONSTRUCTION—PUNCTUATION.** In a deed of land reserving all timber and right to enter for the purpose of removing the timber and the construction and maintenance of a logging road thereon forever, the word "forever" will not be construed to refer only to the maintenance of the logging road, because set off by commas with that clause; since punctuation is of little aid in construction, and the real value and essence of the reservation was the timber and right forever to remove it. *Skamania Boom Co. v. Youmans*..... 94
2. **LOGS AND LOGGING—LIENS—RAILROAD TIES—RIGHT OF LIEN—STATUTES.** Under Rem. & Bal. Code, § 1163, giving a lien for work in manufacturing saw logs and other timber into lumber, "while it remains at the mill where it was manufactured," and defining lumber to include all timber sawed or split, including every article manufactured from saw logs or other timber, there can be no lien on railroad ties manufactured elsewhere than at a mill, nor after the removal of ties from the mill where manufactured. *Forsberg v. Lundgren* 427
3. **SAME.** Rem. & Bal. Code, § 1162, giving a lien for labor in obtaining or securing saw logs, spars, piles, cordwood, shingle bolts, or other timber, includes railroad ties, under the rule of *ejusdem generis*. *Forsberg v. Lundgren*..... 427
4. **SAME—ACTION TO FORECLOSE—FINDINGS—REMOVAL.** A finding that railroad ties were cut and manufactured in the woods precludes any inference that they were manufactured at a mill, within the meaning of Rem. & Bal. Code, § 1163, limiting liens on such ties to the time which they remain at the mill. *Forsberg v. Lundgren*... 427
5. **SAME—ENFORCEMENT OF LIEN—PROCEEDS OF SALE.** On the removal from the state of railroad ties manufactured elsewhere than at a mill, a logger's lien thereon should be enforced out of the proceeds of the sale thereof, garnished and paid into the registry of the court. *Forsberg v. Lundgren*..... 427

MACHINERY:

Liability of employer for defects or failure to guard, see **MASTER AND SERVANT**, 3, 4, 17.

MASTER AND SERVANT:

Joinder by employee of causes arising in contract and tort, in action for injuries, see **ACTION**, 2.

Employment of alienist to assist prosecuting attorney, see **COUNTIES**, 1.

Enjoining breach of contract for personal services and invasion of good will, see **INJUNCTION**.

MASTER AND SERVANT—CONTINUED.

Opening statement as admitting negligence that of independent contractor, see TRIAL, 2.

1. MASTER AND SERVANT—NEGLIGENCE—MEDICAL TREATMENT—FREE TRANSPORTATION TO HOSPITAL. A lumber company that withholds a hospital fee from the wages of employees, for maintaining a hospital, is under an implied obligation to furnish free transportation to an employee, injured and prostrate in the woods, where it had a logging road with engines and equipment at hand for conveying him to the hospital; and is liable for injuries resulting from unreasonable delay in so doing. *Harding v. Ostrander R. & Timber Co.*... 224
2. MASTER AND SERVANT—SAFE PLACE—LUMBER YARD. The duty of a master to furnish a safe place to work applies to working places in a lumber yard where there were piles of lumber impending 12 to 16 feet directly above the working place, and there was but little change in conditions while the men were working before the lumber fell; and such duty is nondelegable. *Dumas v. Walville Lumber Co.* 381
3. SAME—NEGLIGENCE OF INSPECTION—SUFFICIENCY. In an action for injuries to a brakeman through the breaking of a brake rod, a verdict for plaintiff is not sustained by any sufficient evidence that a lumber company, taking a car with a defective brake rod from a railroad to load on its own tracks, could have discovered the defect by a reasonable inspection of the rod, where it appears that the rod broke under the application of physical force to set the brake, that the rod had been previously broken and welded at the same place, no witness saw the rod before the accident, and the sum of the expert evidence was that an inspection would have shown the weld and that there might have been a visible crack, and no custom or method of inspection was shown. *Wilson v. Cain Lumber Co.*... 533
4. MASTER AND SERVANT—SAFE APPLIANCES—RAILROAD CARS—DUTY TO INSPECT. A lumber company operating a logging road and taking cars turned over to it by a railroad company to load on its own tracks, is bound to take notice of a defect in a brake rod that was patent or might be discoverable by the exercise of reasonable diligence, but is not liable for an injury to an employee by the breaking of the rod if the defect would not have been discovered by a reasonable inspection. *Wilson v. Cain Lumber Co.*..... 533
5. MASTER AND SERVANT—BLASTING—DUTY TO WARN—FELLOW SERVANTS. The duty of giving a warning of a blast in a quarry is a non-delegable duty of the master, and the defense of fellow servant is not available. *Allard v. Northwestern Contract Co.*..... 14
6. MASTER AND SERVANT—NEGLIGENCE OF MASTER—DUTY TO WARN—ACTS NOT ANTICIPATED—SCOPE OF ORDER. Where a common laborer, instructed to cool out the neck of a furnace and remove slag, caused an explosion by breaking a block of slag and allowing its molten

MASTER AND SERVANT—CONTINUED.

- contents to come into contact with water, he cannot claim that he should have been warned as to the liability of such an explosion, the breaking of the block of slag being no part of his duty and an act that would not be anticipated by the master. *Ponelli v. Seattle Steel Co.* 269
7. MASTER AND SERVANT—INCOMPETENT FELLOW SERVANT—PLEADING—COMPLAINT. A complaint alleging the incompetence of plaintiff's assistant, by reason of deafness, a fact known to the defendant and not known to the plaintiff, and that plaintiff was injured by reason of stopping to give a second warning to protect the assistant and property in his care, states a cause of action. *Harding v. Ostrander R. & Timber Co.*..... 224
8. MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPALS. Common laborers in a steel plant instructed to cool out the neck of a furnace and remove slag, are fellow servants, and one of them does not become a vice principal by reason of his greater experience, or of his taking the initiative and directing his fellow workman to "make room," whereby the fellow workman was put in a place of danger. *Ponelli v. Seattle Steel Co.*..... 269
9. MASTER AND SERVANT—NEGLIGENCE OF MASTER—DETAILS OF WORK. Permitting the escape of water in cooling the neck of a furnace is not an act of negligence upon the part of the master, where the men themselves were responsible for the condition. *Ponelli v. Seattle Steel Co.* 269
10. MASTER AND SERVANT—FELLOW SERVANTS—SUPERIORS—VICE PRINCIPALS. An expert handler of dynamite in sole charge of the blasting work, who negligently caused a premature explosion, is a vice principal and not a fellow servant of an inexperienced boy, engaged for other duties, and who assisted him and was under his control in the work of loading a blast, by express direction of the foreman. *Durante v. Great Northern R. Co.*..... 395
11. MASTER AND SERVANT—FELLOW SERVANTS—VICE PRINCIPAL. A blacksmith having sole charge and control of a steam hammer and two helpers is a vice principal, and not a fellow servant, with reference to his act in putting the hammer in operation while a helper is in a dangerous position. *Dyer v. Union Iron Works*..... 577
12. MASTER AND SERVANT—FELLOW SERVANTS—ACT OF FOREMAN ASSISTING IN WORK. The negligence of a working foreman of a gang of structural iron workers, engaged in raising a boom stick to the mast of a hoist derrick, is not imputable to the master, where they were all experienced men, the act was simple and there was no hidden danger, it was not customary to furnish an extra man to oversee the work, and the accident happened through the oversight of the foreman in pulling the stick a few inches higher than the

MASTER AND SERVANT—CONTINUED.

- proper place; since it was an omission of fellow service rather than lack of superintendence. *Swanson v. Gordon*..... 27
13. MASTER AND SERVANT—ASSUMPTION OF RISKS—QUESTION FOR JURY. A laborer in a lumber yard does not, as a matter of law, assume the risks from an unstable pile of lumber, by proceeding, without an inspection, to the place where he was directed to work by the foreman of the yard; whether he acted as a reasonably prudent man being for the jury. *Dumas v. Walville Lumber Co.*..... 381
14. SAME—ASSUMPTION OF RISKS. In such a case, the helper does not assume the risk of the negligence of the blacksmith acting as vice principal. *Dyer v. Union Iron Works*..... 577
15. MASTER AND SERVANT—ASSUMPTION OF RISKS—DUTY TO INSPECT. In an action for the death of a millwright whose duty it was to keep the mill in repair, it is proper to refuse an instruction to the effect that it was his duty to inspect and make necessary changes respecting the original system of construction of a penstock, when he was not a constructor or hydraulic engineer. *Neal v. Phoenix Lumber Co.* 523
16. MASTER AND SERVANT—ASSUMPTION OF RISKS—OPEN AND APPARENT DANGERS—DUTY TO WARN. An employee hauling timbers over rolls with a picaroon, along an unguarded walk, four or five feet wide, who fell where, for a space of fifteen feet, there was nothing between the walk and the ground ten feet below, must have known of and assumed the risks, as they were open and apparent; and he cannot allege negligence in failing to warn him of the danger of such open space, where he had passed it several times in his work. *Mayer v. Queen City Lumber Co.*..... 567
17. MASTER AND SERVANT—ASSUMPTION OF RISKS—OBVIOUS DANGER. A common laborer in a wood yard, assisting in sawing wood at a circular saw, assumes the obvious risk of danger from contact with the saw, where he continued at work after objecting to the danger of sawing short lengths without any guards near the saw, and had had some experience with similar saws. *Snyder v. Lamb-Davis Lumber Co.* 587
18. MASTER AND SERVANT—OBEDIENCE TO ORDERS. A direction by a foreman to two men to remove a pile of lumber, one of whom would have to go below, is equivalent to a direct order to the one who did go below. *Dumas v. Walville Lumber Co.*..... 381
19. SAME—CONTRIBUTORY NEGLIGENCE—ACTS IN EMERGENCIES—PLEADING—COMPLAINT. A timber faller, injured by a falling tree, is not shown to be guilty of contributory negligence by his complaint alleging that, by reason of the deafness of his assistant, a fact known to the defendant and not known to him, he was compelled to remain in a place of danger to give a second warning to the assistant and

MASTER AND SERVANT—CONTINUED.

- to remove a cross-cut saw which it was the assistant's duty to remove; contributory negligence not being imputable to acts in emergencies to save human life, and acts to save property being measured by the standard of ordinary prudence in like situations. *Harding v. Ostrander R. & Timber Co.*..... 224
20. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE—EVIDENCE—ADMISSIBILITY. In an action by an employee injured by a blast, it is error to exclude evidence tending to show that the plaintiff had become careless and on different occasions had failed to get under cover when a warning was given, especially where there was a disputed question of fact as to whether a warning had been given. *Allard v. Northwestern Contract Co.*..... 14
21. MASTER AND SERVANT—NEGLIGENCE—CAUSE OF ACCIDENT—FALL OF LUMBER—EVIDENCE—SUFFICIENCY. The evidence warrants a finding that the cause of the fall of a pile of lumber was the negligent manner in which it was piled, where there is irreconcilable conflict in the evidence of the two witnesses who saw the pile before the accident, and from the description of one of them the pile was clearly unstable; and in such case it cannot be said that the cause rests in speculation or conjecture. *Dumas v. Walville Lumber Co.*..... 381
22. MASTER AND SERVANT—BLASTING—WARNING—QUESTION FOR JURY. In an action by an employee injured by a blast, whether a warning was given is for the jury, where the plaintiff and another witness testified that no warning was given, although the greater number of witnesses testified that one was given. *Allard v. Northwestern Contract Co.* 14
23. MASTER AND SERVANT—SAFE PLACE—NEGLIGENCE OF MASTER—EVIDENCE—QUESTION FOR JURY. It is for the jury to determine whether the exercise of reasonable care required the owner of a mill to anticipate that unusually high water, an empty penstock which was structurally defective, and an employee in the wheel pit might occur at the same time, where the penstock was not constructed so as to withstand the pressure of water from without when the water was high and the penstock was empty in that there were no inside upright timbers bracing planks nailed to timbers on the inside, the defendant had owned the mill twelve years, and reasonable care would have ascertained the structural insufficiency of the penstock. *Neal v. Phoenix Lumber Co.*..... 523
24. MASTER AND SERVANT—NEGLIGENCE—STARTING MACHINERY—EVIDENCE—QUESTION FOR JURY. It is for the jury to determine whether a blacksmith was guilty of negligence in starting a steam hammer before his helper had time to place a stop block in position and withdraw his hand from danger, where he himself testified that he placed the heated iron on the die before the block was in place and

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- had to withdraw it, and there was evidence that the hammer was brought down catching the helper's fingers before they could be withdrawn. *Dyer v. Union Iron Works*..... 577
25. **SAME—ASSUMPTION OF RISKS—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.** In such a case, whether the foreman and millwright of the mill assumed the risks, or was in the exercise of reasonable care in entering the penstock, is for the jury, where it appears that he was not employed when the mill was originally constructed, and was not an engineer, but had gained his knowledge by experience only, and there was no evidence that he knew the pressure exerted by the water or the resisting power of the timbers; since he will not be presumed to have known the danger from the physical facts with no knowledge of mechanics. *Neal v. Phoenix Lumber Co*..... 528
26. **SAME—CONTRIBUTORY NEGLIGENCE.** In such a case, contributory negligence of the plaintiff is a question for the jury. *Dyer v. Union Iron Works* 577
27. **MASTER AND SERVANT—INJURY TO THIRD PERSON—LIABILITY OF MASTER.** One who hires a teamster with his team and wagon is as much responsible for the safety of the wagon as though he hired a man to drive his own wagon, so far as third persons are concerned. *Glover v. Richardson & Elmer Co*..... 403
28. **MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTORS—EVIDENCE—QUESTION FOR JURY.** Whether a teamster, employed by defendant with his team and wagon by the month to haul lumber and assist in other work, subject at all times to the control of defendant's foreman, is the servant of the defendant or an independent contractor, rendering defendant liable for his negligent injury of a third person in the course of the employment, is a question for the jury. *Glover v. Richardson & Elmer Co*..... 403
29. **MASTER AND SERVANT—RELATION—INDEPENDENT CONTRACTOR.** Upon an issue as to whether one to whom was sublet the putting up of the structural iron work in a building was a foreman or an independent contractor, the defendant's power of control governs; and a finding that he was a foreman is warranted, where it appears that defendant was to pay the men and furnished the appliances, and would have suffered any loss in case the work cost over eight dollars per ton, and that the defendant was to pay such person for superintendence on a percentage basis, viz., the difference between the actual cost of the work and eight dollars per ton in case the cost was less than that sum. *James v. Pearson*..... 263
30. **SAME—TRIAL—INSTRUCTIONS.** Upon an issue as to whether negligence causing injury to an employee was that of a foreman or of an independent contractor, an instruction submitting the issue as to

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who employed and paid the men and had control of the work, is not erroneous as not properly defining an independent contractor, where another instruction properly defined an independent contractor.
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MEANDER LINE:

See PUBLIC LANDS, 1.

MEASURE OF DAMAGES:

See DAMAGES, 2.

For breach of contract, see SALES, 4, 5.

MECHANICS' LIENS:

Joinder of mortgage lien with in action to foreclose, see ACTION, 1.

Review of defects as dependent on presentation in lower court, see
APPEAL AND ERROR, 2.

Attorney's fees on foreclosure of mortgage and mechanics' liens, see
MORTGAGES, 9.

MEDICAL TREATMENT:

Delay in transporting injured employee to hospital, see MASTER AND
SERVANT, 1.

MINES AND MINERALS:

Transfer of mining claims to corporation in payment of capital stock,
see CORPORATIONS, 7.

Delivery of mining stock in escrow as option for sale, see SALES, 1.

MINORS:

Injury from dynamite caps, see EXPLOSIVES.

Contributory negligence of, see NEGLIGENCE, 2.

Competency as witnesses, see WITNESSES, 1.

MISCONDUCT:

Of counsel in argument, see TRIAL, 1.

MISTAKE:

Ground for reformation of instrument, see REFORMATION OF INSTRU-
MENTS.

MITIGATION:

Of damages, see DAMAGES, 1.

MOOT QUESTION:

Review on appeal, see APPEAL AND ERROR, 9.

MORTGAGES:

Foreclosure of mortgage and mechanics' lien in same action, see ACTION, 1.

Unauthorized sale of by attorney-in-fact, see PRINCIPAL AND AGENT, 3.

Subrogation to rights of mortgagee, see SUBROGATION.

1. **MORTGAGES—EXECUTION—SIGNING—ACKNOWLEDGMENT.** Under Rem. & Bal. Code, § 8746, requiring deeds to be signed and making the acknowledgment a necessary part of its execution, the acknowledgment of a fully prepared mortgage which the mortgagor inadvertently omitted to sign, and which contains the mortgagor's name as grantor, is equivalent in law to a signing of it, or to the adoption of the entire instrument, including the name written thereon as grantor. *American Sav. Bank & Trust Co. v. Helgesen*..... 54
2. **MORTGAGES—CONSTRUCTION—INTEREST—TIME FOR PAYMENT—DEFAULT.** There being no conflict between a mortgage note calling for interest at a certain rate per annum, and a stipulation in the mortgage requiring payment of interest semi-annually, according to the terms of the note, the two are to be construed together as intending semi-annual payments, and hence failure to pay interest semi-annually constitutes a default within the provisions of the mortgage authorizing foreclosure thereon. *Bell v. Engvolsen*..... 33
3. **MORTGAGES—DEEDS—GRANTING CLAUSE—AFTER-ACQUIRED TITLE—ESTOPPEL.** An after-acquired title of mortgagors inures to the benefit of the mortgagee, although the mortgage contained no express words of warranty, where it did contain a granting clause, which, under Rem. & Bal. Code, § 8748, would in a deed constitute a covenant of seizin and for quiet enjoyment, sufficient to pass to a grantee an after-acquired title under Id., § 8765; since the same rule applies as between mortgagor and mortgagee. *American Sav. Bank & Trust Co. v. Helgesen*..... 54
4. **MORTGAGES—LIENS—PRIORITY.** Notes and a mortgage given October 1st for a preexisting debt, assigned November 4th as collateral security for another preexisting debt, have priority over a judgment secured against the mortgagors on December 4th; since liens securing preexisting debts take priority from the respective dates of their creation. *American Sav. Bank & Trust Co. v. Helgesen*..... 54
5. **MORTGAGES—TRANSFER—DEFENSES—BONA FIDE PURCHASER.** Where a mortgage debt is evidenced by negotiable paper, a transfer before maturity in good faith for value frees the mortgage from defenses by reason of infirmities not available against the notes. *American Sav. Bank & Trust Co. v. Helgesen*..... 54
6. **MORTGAGES—DEFAULT—NONPAYMENT OF INTEREST—OPTION—ASSIGNEE.** To entitle the assignee of a mortgage on which an installment of interest is overdue to exercise the option given in the mortgage of declaring the whole sum due, he need only notify the maker

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that he was the holder and that interest could be paid at a certain place, no formal demand of payment being necessary. *James v. Brainard-Jackson & Co.*..... 175

7. **MORTGAGES — FORECLOSURE — PARTIES DEFENDANT.** The former owner of land is not a necessary or proper party defendant to an action to foreclose a mortgage, although the defendants may have claims against him. *James v. Brainard-Jackson & Co.*..... 175
8. **MORTGAGES—LIEN FOR TAXES.** Upon foreclosure, a mortgagee may recover for taxes paid by him, where the mortgage provided that he might pay the taxes and have a lien on the property therefor. *James v. Brainard-Jackson & Co.*..... 175
9. **MORTGAGES — MECHANICS' LIENS—FORECLOSURE—ATTORNEY'S FEES.** In an action to foreclose a mortgage and a mechanics' lien, the allowance of \$60 attorney's fees stipulated in the mortgage and \$50 additional for the mechanics' lien is reasonable, and therefore proper, regardless of the apportionment. *James v. Brainard-Jackson & Co.* 175

MOTIONS:

Dissolution of attachment, see **ATTACHMENT**.

Opening or vacating judgment, see **JUDGMENT**, 1.

Mode of objection to pleading causes of action, see **PLEADING**, 3.

MUNICIPAL CORPORATIONS:

Franchise limiting fare charged by street car company, see **CARRIERS**, 4, 5.

Delegation of legislative power to, see **CONSTITUTIONAL LAW**, 1.

Construction of wharf in street extension over harbor area, see **CONSTITUTIONAL LAW**, 2.

Condemnation by railroad of right to lay tracks in street, see **EMINENT DOMAIN**, 2, 3.

Parol evidence to vary record of proceedings of board of public works, see **EVIDENCE**, 4.

Extension of streets across harbor area and tide lands, see **NAVIGABLE WATERS**.

Laws authorizing adoption of commission form of city government as special legislation, see **STATUTES**, 1, 2.

Laws authorizing adoption of commission form of city government as invalid amendment of laws, see **STATUTES**, 5.

1. **MUNICIPAL CORPORATIONS—ORGANIZATION—CHANGE IN CLASSIFICATION—OFFICERS—ORDINANCES.** After a town of the first class is raised to a city of the third class, the councilmen of the old corporation continue to act and have power to pass ordinances until the organization of the new corporation by the election and qualification of new officers at the next general election, pursuant to the

MUNICIPAL CORPORATIONS—CONTINUED.

provisions of Rem. & Bal. Code, § 7488, providing that it shall be a city of such class upon certification to the secretary of state and that notice thereof shall be taken when the corporation is actually organized by the election and qualification of its officers, and Id., § 7489, providing that the old officers shall act until the next annual municipal election and officers of the new corporation are elected and qualified. *State ex rel. Sylvester v. Superior Court*..... 594

2. MUNICIPAL CORPORATIONS—LOCAL APPLICATION OF STATUTES. Laws 1911, p. 521, authorizing the adoption of the commission form of city government by any city now or hereafter having the required population, is not unconstitutional because of its optional features. *State ex rel. Hunt v. Tausick*..... 69

3. SAME—CLASSIFICATION OF CITIES. Laws 1911, p. 521, authorizing cities of the second class and cities of the third class having a population of 2,500 to adopt the commission form of city government, does not violate Const., art. 11, § 10, requiring classification of cities by general laws in proportion to population, although it creates a new classification for this purpose within the old classes; since the constitution does not require uniformity of general laws relative to municipal corporations, and the act is general and of uniform operation. *State ex rel. Hunt v. Tausick*..... 69

4. MUNICIPAL CORPORATIONS—ADOPTION OF COMMISSION FORM OF GOVERNMENT—ELECTIONS—SPECIAL OR GENERAL. Laws 1911, p. 521, § 2, providing that the commission form of city government may be adopted at a special election held for the purpose, is not void in that Const., art. 11, § 10, authorizes existing cities to become organized under general laws whenever a majority of the electors voting at a general election shall so determine; since the provision for a "special" election may be rejected as surplusage and the election held at the city's general election; neither does the constitutional provision make general the election held for such purpose, but merely fixes the time for holding it. *State ex rel. Hunt v. Tausick*..... 69

5. MUNICIPAL CORPORATIONS—ORDINANCES—DEFECTS—COLLATERAL ATTACK. Reference in a franchise ordinance of the "town" of K., to "city" of K., signed and sealed by the clerk of the "city" of K., are mere informalities that do not affect the validity of the franchise, when attacked by private persons or in collateral proceedings. *State ex rel. Sylvester v. Superior Court*..... 594

6. MUNICIPAL CORPORATIONS—IMPROVEMENTS—CONTRACTS—CHANGE—AUTHORITY OF CITY ENGINEER—RIGHTS OF PARTIES. Under a clause in a contract authorizing a city engineer to make such changes in the plans for a public improvement as the successful prosecution of the work may require, he is not authorized to radically change the slope of the excavations not necessary to correct any structural defects, but made merely to change the cost of the assess-

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- ment, the property owners having specified in their petition for the improvement a specified slope, which the ordinance adopted, and damages to property owners having been awarded on that basis as well as private contracts for reducing lots to street level entered into; hence such contracts must be performed on the original basis, and contractors left to a remedy by reassessments. *Atwood v. Smith* 470
7. SAME—CHANGE IN PLANS—DEFICIENCY IN FUNDS—APPORTIONMENT—BENEFITS. A deficiency in the sums collected on a public improvement cannot be made up by a radical change in the plans, throwing a larger per cent of the cost of excavations upon owners excavating their own lots to street level by private contract, but only by apportionment upon all the property according to benefits. *Atwood v. Smith* 470
8. SAME—CHANGE IN PLANS—RIGHT TO OBJECT—ESTOPPEL. A party is not estopped to question an invalid change in the plans for a public improvement, when notified thereof by the contractor, where he did not mislead the contractor into the belief that he would assent, and shortly after notified him that the matter would be investigated before assent would be given. *Atwood v. Smith*..... 470
9. SAME—CONTRACT—DETERMINATION OF DISPUTES. A clause in a contract between a city contractor and owners, to the effect that all disputes shall be decided by the city engineer, has reference only to disputes arising under the contract, and not to matters clearly not covered by the contract. *Atwood v. Smith*..... 470
10. MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—APPORTIONMENT OF COST—DISCRETION. It is within the discretion of city authorities to make a public improvement wholly at the expense of the property benefited, instead of partly at the expense of the public; and the courts have no power to control such discretion. *Powell v. Walla Walla* 582
11. SAME—AMOUNT OF ASSESSMENT—DISCRETION. The judgment of municipal officers specially authorized to determine the amount of the benefits from a public improvement and assess the same upon specific property benefited is conclusive, and courts will not interfere unless it is so grossly excessive as to amount to a practical confiscation of the property. *Powell v. Walla Walla*..... 582
12. SAME—ASSESSMENTS—PROPERTY SUBJECT—PUBLIC PARKS—LIMIT OF INDEBTEDNESS. As a public park cannot be assessed for benefits from a street improvement, the courts will enjoin an improvement of streets by a city where part of the cost was assessed against a public park, and the city had already reached its constitutional limit of indebtedness. *Powell v. Walla Walla*..... 582
13. MUNICIPAL CORPORATIONS—LOCAL IMPROVEMENTS—PROPERTY ASSESSABLE—LANDLORD AND TENANT—LIABILITY FOR TAXATION—PUBLIC

MUNICIPAL CORPORATIONS—CONTINUED.

- LANDS. A leasehold interest in state tide lands is assessable for local improvements under laws passed since the execution of the lease; since the common law rule of an implied covenant in a lease that the lessor shall pay the taxes has no application to a lease of public lands the fee of which is not subject to taxation. *Trimble v. Seattle* 102
14. MUNICIPAL CORPORATIONS — IMPROVEMENTS — ASSESSMENTS — DEFENSES—ESTOPPEL. Where jurisdiction to levy an assessment was limited to \$6,000, acquiescence therein does not estop the property owners from defending against an assessment for a larger amount. *Chehalis v. Cory*..... 367
15. MUNICIPAL CORPORATIONS—BUILDING PERMITS — APPLICATION — REQUESTS—JURISDICTION—WAIVER OF OBJECTIONS. That an application for a building permit failed to state the kind of animals to be sheltered in the stable, as required by ordinance, and was not accompanied by plans, is not a jurisdictional defect, and is waived, where it appeared that the stable was for horses and no objection was made at the hearing. *State ex rel. Grimmer v. Spokane*..... 388
16. SAME—NOTICE OF APPLICATION—WAIVER. A board of public works cannot revoke its permit to erect a stable because of failure to publish notice of the application for two weeks, where the board fixed the notice and had ample opportunity to investigate, and no one else claims insufficient notice. *State ex rel. Grimmer v. Spokane* 388
17. MUNICIPAL CORPORATIONS—BUILDING PERMITS—REVOCATION—POWER OF BOARD—PROHIBITION. After a board of public works has heard and granted an application for a building permit, in the manner authorized by ordinance, it cannot, in the absence of fraud, revoke the permit as a mere license, no such power being conferred by the ordinance; and prohibition lies to prevent such revocation. *State ex rel. Grimmer v. Spokane*..... 388
18. MUNICIPAL CORPORATIONS—STREETS — ACROSS HARBOR AREA — IMPROVEMENT—WHARVES—NAVIGABLE WATERS — COMMERCE. A city of the first class has authority to construct in a city street extending to deep water across the harbor area, between the inner and outer harbor lines, a gridiron wharf for use as a public landing and convenience to navigation in connection with the use of the street, under its general powers conferred by Rem. & Bal. Code, § 7507, providing that it may construct and maintain public landing places, wharves, and docks, and extend its streets across tide lands and harbor areas in such manner as will best promote the interests of commerce. *Chlopeck Fish Co. v. Seattle*..... 315
19. MUNICIPAL CORPORATIONS—USE OF STREETS—FRANCHISE—TO RAILROADS—POWER TO GRANT. A city may grant a franchise to a railroad company to occupy a portion of a city street where the same

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- does not exclude the public therefrom; and a franchise prohibiting an exclusive use at present or at any time in the future is valid. *State ex rel. Sylvester v. Superior Court*..... 594
20. MUNICIPAL CORPORATIONS—USE OF STREETS—FRANCHISE—TO RAILROADS. Authority to grant to a railroad company a franchise to lay tracks lengthwise in a street is conferred by Rem. & Bal. Code, § 7731, subd. 13, authorizing permits to lay railroad tracks and run cars drawn by horses, steam, or other power thereon. *State ex rel. Sylvester v. Superior Court*..... 594
21. MUNICIPAL CORPORATIONS—STREETS—NEGLIGENT USE—COLLISION WITH AUTOMOBILE—EVIDENCE—SUFFICIENCY. A verdict for injuries sustained by a pedestrian, run down by an automobile, is sustained by the evidence, where it appears that the automobile was driven after nine o'clock, on the left side of the street, without lights, that no warning was given, and that plaintiff exercised due care. *Segerstrom v. Lawrence*..... 245
22. SAME—ACTIONS—EVIDENCE—ADMISSIBILITY. In an action for personal injuries by a pedestrian struck by an automobile, while not commendable practice, it is not prejudicially erroneous to allow the plaintiff, after stating that he looked for vehicles before starting to cross the street, to give as his reasons for looking that his son had shortly before been injured while crossing; as the jury could not have been misled. *Segerstrom v. Lawrence*..... 245
23. SAME. In an action for personal injuries by a pedestrian struck by an automobile, the arrest of the defendant and a bystander's request that defendant take the plaintiff home, immediately following the accident, is admissible in evidence as part of the general transaction. *Segerstrom v. Lawrence*..... 245
24. MUNICIPAL CORPORATIONS—USE OF STREETS—NEGLIGENCE IN LOADING WAGON—EVIDENCE—SUFFICIENCY. There is sufficient evidence of negligence in overloading a wagon, one of the rear wheels of which collapsed in a street and injured a person in the street, where it appears that it was loaded with flooring, estimated to weigh about 2,700 lbs., which protruded back eight feet, throwing the principal weight on the rear wheels, the wagon being built to carry two tons. *Glover v. Richardson & Elmer Co*..... 403
25. SAME—LAW OF ROAD—INSTRUCTIONS—APPEAL—HARMLESS ERROR. Where an automobile, driven on the left side of a street, struck a pedestrian, it is not prejudicial error to give an inaccurate instruction that the law requires vehicles to remain on the right side of the street and that a driver violating such law is bound to exercise a higher degree of care than if he were on the right side; in view of Rem. & Bal. Code, § 5558, requiring passing vehicles to seasonably turn to the right of the center of the road, and Id., § 5569, requiring automobiles on passing, to turn to the right, and the gen-

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- eral "law of the road," arising from usage, requiring persons upon a continuously used street to keep upon the right side. *Seegerstrom v. Lawrence* 245
26. MUNICIPAL CORPORATIONS—NEGLIGENCE—PLEADING—DESCRIPTION OF INJURIES—AMENDMENT—ISSUES AND PROOF. A complaint for personal injuries alleging a severe contusion of the leg, hip, and side, causing severe nervous shock and constant confinement in bed, may properly be amended at the trial to state that the injuries were permanent, and admits of evidence of a condition of extreme nervousness, a twitching of the muscles and palsy of the head, as the natural or probable consequences of the injury. *Owen v. Seattle*.. 10
27. SAME—DEFECT IN SIDEWALKS—NOTICE OF DEFECT—INSTRUCTIONS. In an action against a city for injuries sustained on a defective sidewalk, after instructing the jury as to the law of actual and constructive notice of the defect, it is misleading to state that there is a third kind of notice where the city itself is doing the work which causes the defect. *Owen v. Seattle*..... 10
28. MUNICIPAL CORPORATIONS—FISCAL MANAGEMENT—BONDS — POWER TO ISSUE—SINKING FUND. Rem. & Bal. Code, § 7507, subd. 5, granting to a city power to issue bonds in place of, or to supply means to meet maturing bonds or for the consolidation or funding of bonds, does not authorize a city, upon the issuance of bonds, to pay for a public improvement costing \$875,000, to issue additional bonds in the sum of \$125,000 to be placed in a sinking fund and preserved inviolate for fifty years for the purpose of redeeming and paying the other bonds then to become due; since a sinking fund is to be applied to the extinguishment of a principal debt and cannot be created as part of the debt itself. *Murphy v. Spokane*..... 681
29. MUNICIPAL CORPORATIONS—CLAIMS — PRESENTATION — REASONABLE REQUIREMENTS—FAILURE TO FILE—EXCUSES. It is a reasonable and valid requirement that claims against a city for personal injuries shall be in writing and verified and filed with the city clerk within thirty days; and the same is not excused or substantially complied with by a verbal notice to other officers, or by the statement of an officer that he would report the claim to the city council, or that a letter to a councilman was not answered or objected to. *Cole v. Seattle* 1
30. SAME—EXCUSES FOR FAILURE TO FILE. An ordinance of a city requiring officers to investigate and report all claims or demands against the city that come to their knowledge does not excuse a claimant from filing a verified claim with the city clerk, after bringing it to the notice of an officer of the city. *Cole v. Seattle* 1
31. SAME—WAIVER OF CLAIM. The requirement that a claim against a city must be presented to the city council before action brought

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- cannot be waived by any officers of the city other than the city council. *Cole v. Seattle*..... 1
32. MUNICIPAL CORPORATIONS—PRESENTMENT OF CLAIMS—CONTENTS—REASONABLENESS OF REQUIREMENTS. Rem. & Bal. Code, § 7995, requiring a claim in tort against a city to state the claimant's residence, by street and number, at the time of filing of the claim, and for six months prior to its accrual, is reasonable. *Collins v. Spokane* 153
33. SAME—WAIVER OF OBJECTIONS—PLEADING—ANSWER—ADMISSIONS. An answer admitting the filing and rejection of a claim against a city and denying all other allegations, does not waive the objection that the claim filed was insufficient. *Collins v. Spokane*..... 153
34. SAME—EXCUSES FOR NONCOMPLIANCE. The fact that a claimant's residence was known to the city officials and the claim rejected on its merits, does not excuse the statement of such residence in a claim against the city, as required by statute. *Collins v. Spokane* 153
35. SAME—OBJECTION TO CLAIM—CONDITIONS PRECEDENT TO ACTION. Objection to the sufficiency of a claim filed against a city need not be taken by plea in abatement, as the statute requiring the filing of the claim is mandatory and compliance is a condition precedent which must be alleged and proved. *Collins v. Spokane*..... 153

MURDER:

See HOMICIDE.

MUTUALITY:

Mutual wills, see WILLS, 1.

NAVIGABLE WATERS:

Construction of wharf in street extending across harbor area, see MUNICIPAL CORPORATIONS, 18.

1. NAVIGABLE WATERS—CONTROL—COMMERCE—HARBOR AREA—STREETS—CONSTITUTIONAL PROVISIONS. City streets may be extended in any direction over the harbor area to deep water at the outer harbor line, under Const., art. 15, § 1, providing that the harbor area between the inner and outer harbor lines shall be forever reserved for landings, wharves, streets, and other conveniences of navigation and commerce, and art. 15, § 3, granting to cities the right to extend their streets "over intervening tide lands to and across the area reserved as herein provided." *Chlopeck Fish Co. v. Seattle* 315
2. NAVIGABLE WATERS—LANDS UNDER WATER—HARBOR AREA—STREETS—TITLE OF STATE. The granting by the state to a city of an easement of a street over harbor area is not a surrender of title by the

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- state, the state having plenary control over streets, which may be delegated to municipalities. *Chlopeck Fish Co. v. Seattle*..... 315
3. SAME. The provisions of Laws 1890, p. 731, § 5, authorizing the establishment of waterways to be extended inland across tide lands, including, if practicable, navigable streams, and which are to be forever reserved for public ways for water craft, has no application to street extensions across tide lands and harbor area. *Chlopeck Fish Co. v. Seattle*..... 315
4. NAVIGABLE WATERS—HARBOR AREA—STREETS—PLATS—DEDICATION—MUNICIPAL CORPORATIONS—USE OF "CITY SLIP." In a plat of streets across tide lands and harbor area, the designation at the end of certain streets, "city slip," does not indicate that such streets were to be reserved as open spaces for vessels, but rather, that they were dedicated to the city for a usable connection of the street with the open harbor, especially when such had been the previous use, and that intent was explained to the legislature at the time of the adoption of the plat. *Chlopeck Fish Co. v. Seattle*..... 315

NAVIGATION:

See NAVIGABLE WATERS.

NECESSITY:

Of appeal to secure correction of error in basing judgment on wrong ground, see APPEAL AND ERROR, 6.
For condemnation, see EMINENT DOMAIN, 4-9.

NEGLIGENCE:

See EXPLOSIVES.

Of assignee in prosecuting cause of action, see ASSIGNMENTS.

Causing death, action for damages, see DEATH.

Tort of husband in driving automobile, see HUSBAND AND WIFE.

Demised premises, see LANDLORD AND TENANT, 2.

Of employers, see MASTER AND SERVANT.

Contributory negligence of servant as question for jury, see MASTER AND SERVANT, 25, 26.

In use of city streets, see MUNICIPAL CORPORATIONS, 21-25.

Of railway company, see RAILROADS.

Of person driving horse warranted to be gentle, see SALES, 3.

Opening statement as admitting negligence that of independent contractor, see TRIAL, 2.

1. NEGLIGENCE—DANGEROUS PREMISES—PLEADING—ANSWER. In an action for injuries sustained by a fall upon a stairway landing, an answer alleging contributory negligence states a defense. *Spoar v. Spokane Turn-Verein* 208
2. NEGLIGENCE—EXPLOSION—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE—CHILDREN—QUESTION FOR JURY. In an action for negli-

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gence in leaving dynamite caps and fuse where they could be secured by boys aged from nine to thirteen years, the boys are not, as a matter of law, incapable of contributory negligence, but the question is one for the jury. *Tibbits v. Spokane*..... 570

3. **NEGLIGENCE—IMPUTED NEGLIGENCE — CARRIERS — DRIVER OF STAGE.**

The negligence of the driver of a stage in failing to stop, look, and listen at a railroad crossing cannot be imputed to passengers for hire in a stage; and such negligence is imputed to the passenger by an instruction that the driver's failure to stop, look, and listen was the proximate cause of the injury, preventing any recovery, unless the plaintiffs themselves could have avoided the injury if the railroad company had performed its duty to signal its approach to the crossing. *Field v. Spokane, Portland & Seattle R. Co.*... 445

NEGOTIABLE INSTRUMENTS:

See **BILLS AND NOTES.**

NEWSPAPERS:

Libel, see **LIBEL AND SLANDER.**

Publication of photograph as invasion of right of privacy, see **TORTS.**

NEW TRIAL:

Review of order granting new trial, see **APPEAL AND ERROR, 8.**

1. **NEW TRIAL—CONFLICTING EVIDENCE—REASONS FOR DENIAL.** The denial of a new trial, with expressions indicating that the trial judge would have arrived at a different conclusion, is not error, where the court did not indicate that the verdict was not sustained by the evidence, but only that he was in doubt about it. *Naslund v. Svea Insurance Co.*..... 520

NONRESIDENCE:

Effect on limitation, see **LIMITATION OF ACTIONS, 1-3.**

NONSUIT:

See **DISMISSAL AND NONSUIT.**

NOTES:

Promissory notes, see **BILLS AND NOTES.**

NOTICE:

Waiver of written notice regarding extra work, see **CONTRACTS, 2.**

Of overvaluation of property taken in exchange for stock, see **CORPORATIONS, 9, 10.**

Of hearing for final settlement of executor's account, see **EXECUTORS AND ADMINISTRATORS, 3.**

Loss insured against, see **INSURANCE, 4.**

To judge of affidavit of prejudice, see **JUDGES.**

NOTICE—CONTINUED.

- To maker to pay interest, to entitle assignee to exercise option to declare mortgage debt due, see **MORTGAGES**, 6.
- Publishing application for building permit, see **MUNICIPAL CORPORATIONS**, 16.
- Of defect in sidewalk, see **MUNICIPAL CORPORATIONS**, 27.
- Claim for injuries from defective sidewalk, see **MUNICIPAL CORPORATIONS**, 29-35.
- Right to offset demand existing before notice of assignment of contract, see **SET-OFF AND COUNTERCLAIM**.

OBJECTIONS:

- Necessity for purpose of review, see **APPEAL AND ERROR**, 2.
- To change in plans for public improvement, see **MUNICIPAL CORPORATIONS**, 8.
- To assessment for public improvements, see **MUNICIPAL CORPORATIONS**, 14.
- Waiver of objections to application for building permit, see **MUNICIPAL CORPORATIONS**, 15.
- Waiver, by pleading, of objections to claim filed against city, see **MUNICIPAL CORPORATIONS**, 33.
- To sufficiency of claim against city, how taken, see **MUNICIPAL CORPORATIONS**, 35.
- To pleadings, see **PLEADING**, 3.

OFFER:

- Proposals for contract, see **CONTRACTS**, 1.

OFFICERS:

- Corporate officers, see **CORPORATIONS**, 1-6.
- County officers, see **COUNTIES**, 1.
- Duties of and compliance with election laws, see **ELECTIONS**.
- Municipal officers, see **MUNICIPAL CORPORATIONS**, 1, 6, 10, 11, 17.

OPENING:

- Judgment, see **JUDGMENT**, 1.

OPINION EVIDENCE:

- In civil actions, see **EVIDENCE**, 6.

OPTION:

- To declare mortgage debt due, see **MORTGAGES**, 6.
- Distinguished from sale, see **SALES**, 1.

ORAL CONTRACTS:

- See **FRAUDS, STATUTE OF**.

ORDERS:

- Review, see **APPEAL AND ERROR**.
- Obedience by servant to orders, see **MASTER AND SERVANT**, 18.

ORDINANCES:

Municipal ordinances, see MUNICIPAL CORPORATIONS, 1, 5.

ORGANIZATION:

Of city after change in classification, see MUNICIPAL CORPORATIONS, 1.

PARKS:

Assessment for street improvements, see MUNICIPAL CORPORATIONS, 12.

PAROL CONTRACTS:

See FRAUDS, STATUTE OF.

Parol license for right of way for water ditch, see WATERS AND WATER COURSES, 7.

PAROL EVIDENCE:

To show authority of corporate officers, see CORPORATIONS, 2.

In civil actions, see EVIDENCE, 3-5.

PARTICULARS:

Bill of, see PLEADING, 1.

PARTIES:

Death ground for abatement, see ABATEMENT AND REVIVAL.

Right to resist voluntary dismissal of appeal, see APPEAL AND ERROR, 5.

To proceedings in probate of estate of Indian allottee, see INDIANS, 2.

Foreclosure, see MORTGAGES, 7.

In action for damage caused by fire, see RAILROADS, 2.

Cotenants, see TENANCY IN COMMON, 1.

PASSENGERS:

Carriage of, see CARRIERS, 4, 5.

Imputing negligence of driver of stage to passengers, see NEGLIGENCE, 3.

PATENTS:

Indian patentee of lands, see INDIANS.

PAYMENT:

Liability on accepting paid up stock issued in exchange for property taken at overvaluation, see CORPORATIONS, 9.

Of license by foreign corporation as condition of right to sue, see CORPORATIONS, 18.

Of expense of election by interested parties, see ELECTIONS, 3.

Of interest, time for, see MORTGAGES, 2.

Lien for taxes paid, see MORTGAGES, 8.

PAYMENT—CONTINUED.

- Demand by assignee for payment of overdue interest as condition of exercising option to declare whole sum due, see MORTGAGES, 6.
- Subrogation on payment, see SUBROGATION.
- Of taxes, see TAXATION, 3, 6, 7, 9.
- For redemption from taxes by cotenant, see TENANCY IN COMMON, 2.

PERFORMANCE:

- Of contracts, see CONTRACTS, 2, 3.
- Performance or breach of contract for sale of land, see VENDOR AND PURCHASER, 2.

PERMITS:

- For buildings, see MUNICIPAL CORPORATIONS, 15-17.

PERSONAL INJURIES:

- See NEGLIGENCE.
- Damages for, see DAMAGES.
- Caused by explosives, see EXPLOSIVES.
- Community liability for tort of husband, see HUSBAND AND WIFE.
- Caused by snow and ice on outside stairway, see LANDLORD AND TENANT, 2.
- To employee, see MASTER AND SERVANT.
- To traveler on city street, see MUNICIPAL CORPORATIONS, 21-27, 29-35.
- To person on or near railroad tracks, see RAILROADS, 1.

PHOTOGRAPHS:

- Publication of as libel, see LIBEL AND SLANDER.
- Publication of as invasion of right of privacy, see TORTS.

PLANS:

- Change in plans for public improvement, see MUNICIPAL CORPORATIONS, 6-8.

PLATS:

- Of streets across tide lands and harbor area, see NAVIGABLE WATERS, 4.

PLEADING:

- See ELECTIONS; NEGLIGENCE.
- On note, see BILLS AND NOTES, 4.
- In action by shipper for unjust discrimination, see CARRIERS, 2.
- In criminal prosecutions, see CRIMINAL LAW, 5.
- In action for personal injuries, see DAMAGES, 1.
- Charging offense of violating law prohibiting excessive speed on highway, see HIGHWAYS.
- Filing complaint as commencement of action within time limited, see LIMITATION OF ACTIONS, 4.

PLEADING—CONTINUED.

Allowing demurrer after answer on ground of failure to file complaint within time limited, see **LIMITATION OF ACTIONS**, 5.

Alleging incompetence of fellow servant, see **MASTER AND SERVANT**, 7.

In action for injury to servant, see **MASTER AND SERVANT**, 19.

For personal injuries, see **MUNICIPAL CORPORATIONS**, 26.

Admissions in as waiver of objection to claim filed with city, see **MUNICIPAL CORPORATIONS**, 33.

For fires caused by operation of railroad, see **RAILROADS**, 2.

For breach of contract, see **VENDOR AND PURCHASER**, 6.

1. **PLEADING—SUFFICIENCY OF COMPLAINT—BILL OF PARTICULARS—ACTION FOR DEATH—DISCRETION.** It is not an abuse of discretion to refuse to order a bill of particulars as to the negligent construction of a penstock of a mill, alleged to be such that the penstock would not withstand the pressure of high water when it was empty, where the defendant had owned it for twelve years and knew the manner of its construction, especially in an action for death caused thereby. *Neal v. Phoenix Lumber Co.*..... 523
2. **PLEADING—COMPLAINT—DEMURRER—INFERENCES.** In the absence of a motion to make more definite and certain, a demurrer should not be sustained because of the failure of a complaint to allege a certain fact, where the fact can be inferred from the whole complaint. *White Bros. & Crum Co. v. Watson*..... 666
3. **PLEADING—DEMURRER—SEPARATE STATEMENT OF CAUSES.** An objection that causes of action are not separately stated cannot be raised by demurrer, but only by motion. *Harding v. Ostrander R. & Timber Co.*..... 224

POLICY:

Of insurance, see **INSURANCE**.

POLLS:

Closing polls before time, see **ELECTIONS**, 2.

POPULATION:

Of cities adopting commission form of city government, see **MUNICIPAL CORPORATIONS**, 3.

POWERS:

Delegation to city of legislative powers, see **CONSTITUTIONAL LAW**, 1.
Of board of public works to revoke building permit, see **MUNICIPAL CORPORATIONS**, 17.

Grant of franchise to railroad to use city street, see **MUNICIPAL CORPORATIONS**, 19, 20.

Power to issue bonds for creation of sinking fund, see **MUNICIPAL CORPORATIONS**, 28.

Of agent, see **PRINCIPAL AND AGENT**.

PRACTICE:

See APPEAL AND ERROR; ATTACHMENT; CRIMINAL LAW; DISMISSAL AND NONSUIT; JUDGMENT; LIMITATION OF ACTIONS; PLEADING; TRIAL.

Prosecution of actions in general, see ACTION.

Notice and filing of affidavit of prejudice, see JUDGES.

PREJUDICE:

Ground for reversal in civil actions, see APPEAL AND ERROR, 14-17.

Of election officers, see ELECTIONS, 3.

Ground for estoppel, see ESTOPPEL.

Of judge, see JUDGES.

PREMEDITATION:

Instructions as to, see CRIMINAL LAW, 6; HOMICIDE, 4.

PREMISES:

Maintenance of dangerous premises, see LANDLORD AND TENANT, 2.

Dangerous premises, pleading defense, see NEGLIGENCE, 1.

PRESCRIPTION:

Acquiring easement by, see EASEMENTS.

PRESENTMENT:

Of claims against city, see MUNICIPAL CORPORATIONS, 29-35.

PRESUMPTIONS:

As to alteration in deed, see ALTERATION OF INSTRUMENTS.

Of negligence from passing of engine followed by fire, see RAILROADS, 5.

As to implied exemption from taxation, see TAXATION, 1.

PRINCIPAL AND AGENT:

See BROKERS.

Corporate officers and agents, see CORPORATIONS, 1-6.

County agents, see COUNTIES, 1.

1. PRINCIPAL AND AGENT—RELATION—EVIDENCE. Lighterers who had agreed to collect and pay over freight charges on freight carried by a vessel are not shown to be, in all things, agents of the operators of the vessel, where the contract provided that a local agent of the operators was to make adjustments and payments to the lighterers for lighterage and services. *Boston Tow Boat Co. v. Sesnon Co.* 375
2. PRINCIPAL AND AGENT—AUTHORITY OF AGENT—INDORSEMENT OF NOTE. An agent's authority to sign his principal's name to the indorsement of notes sufficiently appears, where he made the loan and was personally interested therein, and received the notes and had possession thereof as agent, although his power of attorney, standing alone, might not have been sufficient. *American Sav. Bank & Trust Co. v. Helgesen*..... 54

PRINCIPAL AND AGENT—CONTINUED.

3. **PRINCIPAL AND AGENT—UNAUTHORIZED SALE OF MORTGAGE—RATIFICATION.** The assignment of a mortgage by an attorney-in-fact of the mortgagee, in excess of his authority, is clearly ratified, and cannot be set aside as fraudulent, where, after notice thereof, the mortgagee treated with his agent and took security from him to cover the proceeds misappropriated by the agent, and failed to defend an action for foreclosure brought by the assignee, and there was no evidence of collusion or fraud on the part of the assignee. *McCoy v. Simon*..... 574

PRIORITIES:

- Of mortgages, see **MORTGAGES**, 4.
Of water rights, see **WATERS AND WATER COURSES**, 2.

PRIVATE ROADS:

- Rights of way, see **EASEMENTS**.

PROBATE:

- Of will, see **WILLS**.

PROCESS:

- Appearance as curing defect in service of, see **INSANE PERSONS**, 1.

PROHIBITION:

- Of traffic in intoxicating liquors, see **INTOXICATING LIQUORS**.
To prevent revocation of building permit, see **MUNICIPAL CORPORATIONS**, 17.

PROMISSORY NOTES:

- See **BILLS AND NOTES**.

PROOF:

- Of loss insured against, see **INSURANCE**, 4.

PROPERTY:

- See **FIXTURES; LOGS AND LOGGING**.
Taking without due process of law, see **CONSTITUTIONAL LAW**, 2.
Taking or damaging for public use, see **EMINENT DOMAIN**.
Subject to assessment for public improvement, see **MUNICIPAL CORPORATIONS**, 12, 13.
Taxation of, see **TAXATION**.

PROSECUTING ATTORNEYS:

- Dismissal of prosecution by, see **CRIMINAL LAW**, 1-3.
Appearance by in proceedings for appointment of guardian, see **INSANE PERSONS**.

PUBLICATION:

Of photograph as libel, see **LIBEL AND SLANDER**.

Notice of application for building permit, see **MUNICIPAL CORPORATIONS**, 16.

Of photograph as invasion of right of privacy, see **TORTS**.

PUBLIC DEBT:

Issuance of bonds for sinking fund, see **MUNICIPAL CORPORATIONS**, 28.

PUBLIC IMPROVEMENTS:

By municipalities, see **MUNICIPAL CORPORATIONS**, 6-14, 28.

PUBLIC LANDS:

Construction by city of wharf in street extension over harbor area, see **CONSTITUTIONAL LAW**, 2.

Allotment and alienation of, see **INDIANS**.

Assessment of leasehold interest in for local improvement, see **MUNICIPAL CORPORATIONS**, 13.

Extension of streets over harbor area and tide lands, see **NAVIGABLE WATERS**.

Appropriation of water on, see **WATERS AND WATER COURSES**, 1, 2, 4.

1. **PUBLIC LANDS — BOUNDARIES — MEANDER AND HIGH TIDE LINES.** Land below the government meander line, and above the line of high tide at the time of the admission of the state to the Union, is upland and passes with the government patent of the meandered upland. *Nassa v. Seaborg*..... 164
2. **PUBLIC LANDS — HOMESTEAD — ALIENATION — GRANT OF USE FOR WATER DITCH.** The grant of a right of way for a ditch across public lands in possession of a homesteader before final proof, in consideration of the right to take and use water from the ditch, is not an alienation of the land within the purview of U. S. Rev. St. § 2288; and the owner of the ditch cannot invoke the rule that the contract for water was void as against public policy, in order to defeat the taking and use of the water pursuant to the contract. *Methow Cattle Co. v. Williams*..... 457
3. **PUBLIC LANDS—TIDE LANDS—FILLS—COST OF FILL IN STREETS.** Where a contract for filling unplatted tide lands, under Rem. & Bal. Code, § 8103, limited the cost to 16 cents per cubic yard, and subsequently the lands were platted, the cost of the fill in streets and alleys is to be added and charged to the abutting lands; even if it was contemplated, at the time the contract was made, that the land was to be platted, in view of Rem. & Bal. Code, § 8107, providing that the cost of filling streets and alleys shall be apportioned to the lands benefited; since the purchaser of platted tide lands, under his preference right, takes the fee of the abutting streets. *Bussell v. Ross* 418

PUBLIC POLICY:

- Validity of agreement limiting liability of carrier in carriage of live stock, see **CARRIERS**, 3.
- Validity of seller's agreement not to conduct competing business, see **GOOD WILL**.
- Validity of water agreement, see **PUBLIC LANDS**, 2.
- Validity of provision in contract against assignment, see **VENDOR AND PURCHASER**, 1.

PUBLIC USE:

- Taking property for public use, see **EMINENT DOMAIN**.

PUNCTUATION:

- As aid in construing reservation in deed, see **LOGS AND LOGGING**, 1.

QUESTION FOR JURY:

- Whether changes and extra work warrant extension of time for completion of work, see **CONTRACTS**, 3.
- Cancellation of insurance policy, see **INSURANCE**, 1.
- In action for injuries to servant, see **MASTER AND SERVANT**, 13, 22, 23-26, 28.
- Contributory negligence of minors, see **NEGLIGENCE**, 2.
- Cause of fire, see **RAILROADS**, 4.
- Contributory negligence in driving horse warranted to be gentle, see **SALES**, 3.

RAILROADS:

- Carriage of goods and passengers, see **CARRIERS**.
- Jurisdiction of action by shipper for unjust discrimination, see **COURTS**, 3.
- Appropriation of property, see **EMINENT DOMAIN**, 2, 3, 5, 6.
- Use of city streets, see **MUNICIPAL CORPORATIONS**, 19, 20.

1. **RAILROADS — ACCIDENT AT CROSSINGS — CONCURRING NEGLIGENCE.**
Where an accident to passengers in a stage at a crossing is caused by the concurring negligence of the railroad company in failing to give a signal and of the stage driver in failing to stop, look, and listen, they are both jointly and severally liable, and an instruction to the contrary is prejudicial error. *Field v. Spokane, Portland & Seattle R. Co.*..... 445
2. **RAILROADS — FIRES — ACTIONS — PLEADING AND PROOF — TITLE TO PROPERTY—PARTIES—CAPACITY TO SUE—AMENDMENT OF COMPLAINT.**
In an action against a railroad company for setting fire to a house, alleged to belong to the plaintiff, it cannot be objected that the evidence showed that another owned a life estate therein, where the plaintiff offered to file a stipulation releasing all liability to the life tenant, which was done prior to a verdict by the life tenant, who entered an appearance in the action; and it was not necessary to

RAILROADS—CONTINUED.

make the life tenant a party by formal amendment of the complaint, as it will be treated as amended to conform to the proofs. *Overacker v. Northern Pac. R. Co.*..... 491

3. **RAILROADS — FIRES — CONDITION OF ENGINE — EVIDENCE — SUFFICIENCY.** The jury are warranted in finding that an engine is not shown to be in good condition for arresting sparks unless there was an examination of a certain plate, which was the most important feature in the spark arresting device and unsafe if it had holes in it, where the plate could not be examined without taking off the netting, and mechanics had been instructed not to take off the netting except to clean out the nozzle, and this had not been done for some time. *Overacker v. Northern Pac. R. Co.*..... 491

4. **RAILROADS — FIRES — EVIDENCE — CAUSE OF FIRE — QUESTION FOR JURY.** Evidence that an engine threw sparks some distance large enough to ignite fires, and that a house without any fire in it was within the danger zone and was burned shortly after the passing of the engine, is sufficient to raise a question for the jury as to whether the fire was ignited by a spark from the engine. *Overacker v. Northern Pac. R. Co.*..... 491

5. **RAILROADS—FIRES—BURDEN OF PROOF—PRESUMPTIONS—EVIDENCE—SUFFICIENCY.** While the burden of proof is probably upon a railroad company to explain the cause of fire following the passage of an engine, negligence cannot be presumed from the mere passage of an engine followed by a fire; the fact of ignition being *prima facie* evidence only when it is shown that the fire proceeded from the engine; and a verdict for the defendant is warranted, where the fire was not discovered until an hour after the engine had passed, a witness testified that the engine was not throwing sparks an unusual distance or more than usual, there was no evidence of negligent operation or defective equipment, and the jury found for the defendant upon the remaining issue as to negligent accumulations of debris on the right of way. *Thorgrimson v. Northern Pac. R. Co.* 500

RAPE:

1. **RAPE—EVIDENCE—CORROBORATION—STATUTES—CONSTRUCTION.** Rem. & Bal. Code, § 2443, providing that no conviction shall be had for rape and other sexual crimes upon the testimony of the prosecutrix unless supported by other evidence, requires evidence from an independent source having a tendency to connect the accused with the crime; although the same act repealed Rem. & Bal. Code, § 2155, requiring, in prosecutions for rape and seduction, corroborating evidence tending to "convict the defendant" of the offense; the intention being to extend the rule to other crimes than rape and seduction, rather than to abrogate the former rule. *State v. Gibson* 131

RAPE—CONTINUED.

2. **RAPE—EVIDENCE—CORROBORATION—SUFFICIENCY.** Upon a prosecution for rape, evidence that the prosecutrix started for the place where she claims to have met the defendant at the time of the offense, is not sufficient corroborating evidence to sustain a conviction within Rem. & Bal. Code, § 2443, requiring the testimony of the prosecutrix to be supported by other evidence, where no one testified to taking or seeing her there, or that she and the defendant were at any time isolated from others. *State v. Gibson*... 131
3. **SAME.** Proof of acquaintance and opportunity is not sufficient corroborating evidence to sustain a conviction of rape, within Rem. & Bal. Code, § 2443, requiring the testimony of the prosecutrix to be supported by other evidence, where other young men had intimate acquaintance with her and more ample opportunity. *State v. Gibson* 131
4. **SAME.** In a prosecution for rape, where another had been first charged with the offense and offered to marry the girl and officers sought to secure evidence against him, the fact that such party was warned by the accused and advised to leave the state, does not show an attempt by the accused to fix the crime upon another or constitute sufficient corroborating evidence to support a conviction under Rem. & Bal. Code, § 2443, requiring the testimony of the prosecutrix to be supported by other evidence. *State v. Gibson* 131

RATIFICATION:

- Of acts of corporate officers, see CORPORATIONS, 6.
- Of act of agent, see PRINCIPAL AND AGENT, 3.

REAL ESTATE AGENTS:

See BROKERS.

REAL PROPERTY:

- See PUBLIC LANDS.
- Commissions on sale by, see BROKERS.
- Easements in, see EASEMENTS.
- Taking or damaging for public use, see EMINENT DOMAIN.
- Indian lands, see INDIANS.
- Lease of, see LANDLORD AND TENANT.
- Taxation of, see TAXATION.
- Sale of, see VENDOR AND PURCHASER.

RECEIVERS:

- Dismissal of appeal from order appointing, on ground of cessation of controversy, see APPEAL AND ERROR, 1.
- Of corporations in general, see CORPORATIONS, 10, 15.

RECORDS:

- On appeal, see **APPEAL AND ERROR**, 4.
- Parol evidence to vary record of public board, see **EVIDENCE**, 4.
- Failure to record tax sale as constituting defect in title of vendee, see **TAXATION**, 5.

REDEMPTION:

- From tax judgment, see **TAXATION**, 6.
- From taxes by cotenant, see **TENANCY IN COMMON**, 2.

REDUCTION:

- Of damages by party injured, instructions as to, see **TRIAL**, 5.

REFORMATION OF INSTRUMENTS:

1. **REFORMATION OF INSTRUMENTS—MISTAKE—EVIDENCE.** A contract for the sale of land should be reformed where it was intended that, upon partial payments, parts of the lands might be released at agreed valuations of \$85 per acre for valley land, \$75 per acre for certain overflowed valley land, and \$20 for the balance which was hill land, and a mistake was made in designating the valley land, part of which was omitted from the description of that class. *Rohlinger v. Coletta Land & Orchard Co.*..... 348

REHEARING:

- Scope and extent, see **APPEAL AND ERROR**, 20.
- Consideration of curative acts on rehearing, see **STATUTES**, 3.

RELEASE:

- Of damages under agreement to pay expense of treatment until cured, see **DAMAGES**, 3.

REMOVAL:

- Of buildings by tenant as trade fixtures, see **FIXTURES**.
- Right to lien after removal of product from mill, see **LOGS AND LOGGING**, 2, 4, 5.

RENT:

- See **LANDLORD AND TENANT**, 3.
- Acceptance of lease by corporation and liability for rent, see **CORPORATIONS**, 3.

REPLEVIN:

1. **REPLEVIN—EVIDENCE—FAILURE OF PROOF.** A judgment in replevin for the return of two spans of mules and harness and wire fencing, or their value, cannot be sustained where the proof failed to show that defendant was in possession of the harness or wire fencing, and there was no evidence of the value of the mules disassociated from the harness. *Fries v. Lockwood*..... 221

REQUESTS:

For instructions, see TRIAL, 5.

RESCISSION:

Of contract of sale of goods, see SALES, 2.

RESERVATION:

Deed reserving timber on land, see LOGS AND LOGGING, 1.

RESIDENCE:

Effect on limitation, see LIMITATION OF ACTIONS, 1-3.

Statement of in claim for injuries, see MUNICIPAL CORPORATIONS, 32, 34.

RES JUDICATA:

See JUDGMENT, 3.

Dismissal as bar to another prosecution, see CRIMINAL LAW, 1, 2.

Decision of interior department as to heirship of deceased allottee, see UNITED STATES.

RESOLUTION:

For submission of county bond issue to vote, see COUNTIES, 3.

RETROSPECTIVE LAWS:

See STATUTES, 3.

REVENUE:

See TAXATION.

REVIEW:

See APPEAL AND ERROR; CRIMINAL LAW, 4-7.

REVIVAL:

Of action, see ABATEMENT AND REVIVAL.

REVOCATION:

Of consent to sale of land by death of allottee, see INDIANS, 1.

Of building permit, see MUNICIPAL CORPORATIONS, 16, 17.

Of license to maintain ditch, see WATERS AND WATER COURSES, 7.

Of mutual will, see WILLS, 1.

RIGHT OF WAY:

See EASEMENTS.

RIPARIAN RIGHTS:

See WATERS AND WATER COURSES, 2-4, 8.

RISKS:

Assumed by employee, see MASTER AND SERVANT, 13-18, 25.

ROADS:

See HIGHWAYS.

Streets in cities, see MUNICIPAL CORPORATIONS.

ROBBERY:

Self-defense in repulsion of robbery as justification for homicide, see HOMICIDE, 1.

SAFE PLACE TO WORK:

See MASTER AND SERVANT, 2, 23.

SALES:

Of corporate stock, see CORPORATIONS.

Requirements of statute of frauds, see FRAUDS, STATUTE OF.

Of business and agreement not to conduct competing business, see GOOD WILL.

Of intoxicating liquors, see INTOXICATING LIQUORS.

Enforcing lien from proceeds of sale of product removed from state, see LOGS AND LOGGING, 5.

By agents, see PRINCIPAL AND AGENT, 3.

Tax sales, see TAXATION.

Of realty, see VENDOR AND PURCHASER.

1. **SALES—OPTIONS—NATURE OF TRANSACTION—CONSTRUCTION BY PARTIES—CORPORATE STOCK.** The delivery of mining stock to a bank in escrow under a written agreement directing the delivery of the stock upon payment of specified sums at stated times, which payments were to draw interest "if paid," and providing that if the payments were not made the bank was to return the stock to the owner, is an option and is not enforceable as a sale by the owner seeking to recover the purchase price; especially where in contemporaneous letters he construed it as an option. *Fry v. Thorne*.. 479
2. **SALES — RESCISSION BY VENDEE — WAIVER — DILIGENCE — USE OF GOODS.** The right to rescind a sale of a car load of elm hoops and liners for breach of warranty as to quality is waived, and the purchaser cannot use a part and tender pay for the part used, in defense of an action for the price, where, on receipt of the shipment, objection was made to the quality and a twenty-five per cent deduction from the invoice price claimed, which claim was promptly disallowed by the seller, who directed the purchaser to notify by wire immediately if the stock could not be used, which the purchaser failed to do, but during several months used a large percentage of the shipment under continual claims for credit on account of breakage; since diligence in returning or offering to return the goods is essential. *Noble v. Olympia Brewing Co.*... 461
3. **SALES—BREACH OF WARRANTY—DEFENSES—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS—QUESTION FOR JURY.** Where a horse, sold March 20, 1909, was warranted gentle, and was in the purchaser's possession until June 10 when it ran away, in an action for breach

SALES—CONTINUED.

of the warranty, in which there was evidence that the plaintiff had notice that the horse was high spirited, that plaintiff was an unskillful driver and negligent, and had ample opportunity of learning the character and habits of the horse, it is error to refuse to instruct the jury that the plaintiff could not recover for personal injuries sustained in the runaway, if guilty of contributory negligence in driving which in whole or in part caused the runaway and accident; whether sufficient time had elapsed to acquaint the plaintiff with the true character of the horse, and the contributory negligence, being questions for the jury. *Mullerleile v. Brandt*..... 280

4. SALES — BREACH OF WARRANTY — DAMAGES — MEASURE. Upon breach of a warranty that a horse was a gentle family driving horse, damages for personal injuries sustained in a runaway while attempting to drive it may be recovered on showing the breach and damages, without any proof of the value of the horse. *Mullerleile v. Brandt* 280

5. SALES—BREACH—DELIVERY — DAMAGES FOR DELAY. Damages by reason of delay in delivering iron sold for the construction of a certain bridge are reasonably within the contemplation of the parties and recoverable, where the seller agreed to ship the iron within thirty days, and knew that certain false work was necessary, which flood stages of the river would sweep away if the bridge was not promptly completed, and the seller failed to furnish the steel for six months, at which time the false work had been swept away. *Interstate Engineering Co. v. Archer*..... 629

SELF-DEFENSE:

See HOMICIDE, 1-3.

SERVICE:

Appearance as curing defect in service of process, see INSANE PERSONS, 1.

SERVITUDES:

See EASEMENTS.

SET-OFF AND COUNTERCLAIM:

Right to offset expense of treatment upon failure to cure plaintiff under agreement given in consideration of release, see DAMAGES, 3.

1. SET-OFF AND COUNTERCLAIM—ACTION ON ASSIGNED CLAIMS—NOTICE OF ASSIGNMENTS. Under Rem. & Bal. Code, § 266, providing that, in a civil action upon contract assigned to the plaintiff, the defendant may set off any demand of like nature against the person originally liable if it existed at the time of the assignment and belonged to the defendant in good faith before notice of the assignment, defendants, who, as ship lighters, had agreed with the charterers of a vessel

SET-OFF AND COUNTERCLAIM—CONTINUED.

to collect and turn over all freight charges less compensation for lighterage, may offset an indebtedness to them from the charterers for their failure to deliver coal and grain shipped in their care, in an action for the freights collected, brought by the owners of the vessel upon abandonment of the vessel by the charterers; the lighterers having had no notice that the charterers had abandoned the vessel or agreed to collect and hold in trust for the owners the proceeds of the voyage. *Boston Tow Boat Co. v. Sesnon Co.*.... 375

SETTLEMENT:

Of executor's account and fixing compensation, see **EXECUTORS AND ADMINISTRATORS**, 3.

SHIPPING:

Liquor licenses required by steamboat from each county in which sales are made, see **INTOXICATING LIQUORS**.

SIGNING:

Of mortgage, see **MORTGAGES**, 1.

SLANDER:

See **LIBEL AND SLANDER**.

SPECIAL LAWS:

See **STATUTES**, 1, 2.

SPECIFIC PERFORMANCE:

Of contract for issuance of corporate stock, see **CORPORATIONS**, 17.

1. **SPECIFIC PERFORMANCE — FRAUD — DILIGENCE — EVIDENCE — SUFFICIENCY.** Specific performance of an agreement to trade lands, rescinded on the ground of fraud before the deal was finally closed, will not be decreed, when it appears that defendant was induced to pay \$32.50 per acre for land not worth over \$12, by false representations as to the character of the soil, that the purported owner thereof had no interest in the lands, that the agent assuming to advise the defendant was in the pay of the other side, and that defendant's only visit to inspect the land was made at its most favorable season before the soil began to show that it was not of the character represented. *Jones v. Hawk*..... 171

STATEMENT:

Of case or facts for purpose of review, see **APPEAL AND ERROR**, 4.

Separate statement of causes of action, see **PLEADING**, 3.

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STATES:

- Legislative power, delegation of, see CONSTITUTIONAL LAW, 1.
- Courts, see COURTS.
- Assessment of leasehold interest in state lands, see MUNICIPAL CORPORATIONS, 13.
- Public lands, see PUBLIC LANDS, 3.

STATUTES:

- See LIBEL AND SLANDER; WATERS AND WATER COURSES, 4-6.
 - Boundary and division fences, see ANIMALS.
 - Considering effect of retroactive statute on rehearing, see APPEAL AND ERROR, 20.
 - Validity of agreement limiting liability of carrier, see CARRIERS, 3.
 - Laws permitting transfer of mining claim to corporation in payment of capital stock, see CORPORATIONS, 7.
 - Act validating bond issue in aid of waterway district, see COUNTIES, 4.
 - Dismissal of criminal prosecution, see CRIMINAL LAW, 1-3.
 - Construction of eminent domain laws, see EMINENT DOMAIN, 1.
 - Statute of frauds, see FRAUDS, STATUTE OF.
 - Retroactive effect of provision for application of statute of limitations to actions for recovery of Indian lands, see INDIANS, 3.
 - Licensing sale of liquors, see INTOXICATING LIQUORS.
 - Construction of statute providing for filing of affidavit of prejudice, see JUDGES.
 - Of limitation, see LIMITATION OF ACTIONS.
 - Granting liens for labor on logs and timber products, see LOGS AND LOGGING, 2, 3.
 - Authorizing commission form of city government, see MUNICIPAL CORPORATIONS, 2-4.
 - Corroboration of female, see RAPE, 1.
 - Imposing treble damages for cutting timber, see TRESPASS.
1. STATUTES — SPECIAL LEGISLATION — MUNICIPAL CORPORATIONS. Const., art. 2, § 28, subd. 8, prohibiting the enactment of special laws to incorporate any city or amend a city charter, is not violated by Laws 1911, p. 521, authorizing the cities of a specified population to adopt the commission form of city government. *State ex rel. Hunt v. Tausick*..... 69
 2. SAME—POPULATION OF CITY—JUDICIAL NOTICE. Laws 1911, p. 521, authorizing cities having a population of 2,500 and less than 20,000 to adopt the commission form of city government, does not restrict its application to any particular city or special territory, as the court takes judicial notice that there are many cities within the limitation. *State ex rel. Hunt v. Tausick*..... 69
 3. STATUTES — CURATIVE ACTS — RETROACTIVE OPERATIONS — PENDING CASES. Curative statutes which do not impair the obligations of contracts and are intended to be retroactive, are applicable to pend-

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- ing cases, and will be considered by the supreme court, on petition for rehearing, although enacted after the filing of a decision. *State ex rel. Bussell v. Abraham*..... 621
4. **STATUTES—TITLE—SUFFICIENCY.** The title “an act relating to crimes and punishments and the rights and custody of persons accused or convicted of crime and repealing certain acts,” is broad enough to include § 2290 of Rem. & Bal. Code, providing that it shall be competent to show the former conviction of witnesses either by record, cross-examination or other evidence; since the title and act manifest an intention that it shall take the place of previous enactments and procedure, even though a former statute had been construed to require proof by record. *State v. Blaine*..... 122
5. **STATUTES—ENACTMENT—AMENDMENTS OR MODIFICATION OF EXISTING LAWS.** Laws 1911, p. 521, § 2, authorizing the adoption of a commission form of city government, and leaving in force all existing laws not inconsistent with the act, is not violative of Const., art. 2, § 37, providing that no act shall be revised or amended without reference to its title, setting forth the amended section in full, and § 38, providing that amendments shall not be allowed which shall change the scope or object of the bill; since those sections of the constitution do not apply to the modification of existing laws by acts complete in themselves or by supplemental acts not altering the original act. *State ex rel. Hunt v. Tausick*..... 69

STAY:

Appeal from order fixing bail as effecting stay of proceedings, see BAIL.

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Corporate stock, see CORPORATIONS, 7-17.

STOCKHOLDERS:

Of corporations see CORPORATIONS, 7-16.

STREET RAILROADS:

Carriage of passengers, see CARRIERS.

Damages for breach of contract of carriage, see DAMAGES, 7.

Parol evidence to explain franchise of, see EVIDENCE, 3.

STREETS:

See HIGHWAYS; MUNICIPAL CORPORATIONS.

Construction of wharf in street extending across harbor area as taking of property without due process of law, see CONSTITUTIONAL LAW, 2.

Condemnation of right to lay tracks in, see EMINENT DOMAIN, 2, 3.

Extension over harbor area, see NAVIGABLE WATERS, 1-3.

SUBPOENA:

To compel production of documents, see EVIDENCE, 2.

SUBROGATION:

1. SUBROGATION — MORTGAGES — FORECLOSURE — PAYMENT OF FIRST MORTGAGE. Upon the foreclosure of two mortgage liens, the second mortgagee is properly subrogated to the rights of the first mortgagee, upon paying into court the amount due on the first mortgage. *James v. Brainard-Jackson & Co.*..... 175

SUBSCRIPTIONS:

To corporate stock, see CORPORATIONS, 7-17.

TAXATION:

See COUNTIES.

Alteration of tax deed, see ALTERATION OF INSTRUMENTS.

Liquor license, see INTOXICATING LIQUORS.

Lien for taxes upon foreclosure of mortgage, see MORTGAGES, 8.

Assessments for local improvements, see MUNICIPAL CORPORATIONS, 7, 10-14.

Payment for redemption from taxes by tenant in common of community property, see TENANCY IN COMMON, 2.

Unpaid taxes as affecting title of vendor, see VENDOR AND PURCHASER, 2.

1. TAXATION—EXEMPTIONS—PRESUMPTION. There is no implied exemption from the burden of taxation. *Trimble v. Seattle*..... 102
2. TAXATION—ASSESSMENT—EXCESSIVE VALUATION—LEASEHOLD—EVIDENCE—SUFFICIENCY. An assessed valuation of \$225,000 for a leasehold is excessive, and should be reduced to \$90,000, where it appears that the lessee's improvements cost nearly one and a half million, to meet which and other expenses, it has outstanding \$1,844,000 in bonds, that the improvements revert to the landlord on forfeiture of the lease, and that for two years the property had been operated at an increasing loss of \$30,000 and \$42,000 per year, and competent witnesses testified that the lease did not have any actual value at present and that its future value was speculative, depending upon the development of the city and neighborhood. *Metropolitan Building Co. v. King County*..... 615
3. TAXATION—FORECLOSURE AND SALE—DEFENSES—PAYMENT OF TAX. A tax deed, upon foreclosure of a delinquency certificate, is void, where, long before the date of delinquency, the owner sent the county treasurer more than enough money to pay all taxes, receipt for which was duly issued, and the certificate of delinquency was issued by mistake of the treasurer, and foreclosure and sale were had without actual notice to the owner. *Loving v. Maltbie*..... 336
4. TAXATION—TAX TITLE—FORECLOSURE — RELIEF — EQUITY JURISDICTION—LIEN FOR TAXES. The foreclosure of a tax certificate being a

TAXATION—CONTINUED.

special proceeding, upon the failure of the action, the court cannot retain jurisdiction to grant equitable relief for taxes paid, and the action should be dismissed without prejudice to an appropriate proceeding to establish an equitable lien. *Trumbull v. Bruce*.. 644

5. TAXATION—TAX SALES—LIENS—VENDOR AND PURCHASER—TITLE OF VENDOR. Under Laws 1891, p. 167, § 5, providing that purchasers at tax sales prior to November 1891 shall have no lien on the property as against purchasers in good faith, unless they file their tax certificates or deeds for record on or before the first day of November 1892, a sale for taxes in 1884, not recorded as required, does not constitute a defect in the title and a vendee cannot rescind a sale on account thereof. *Ready v. Sound Investment Co*..... 422
6. TAXATION—REDEMPTION—PAYMENT OF TAX JUDGMENT—TENANTS IN COMMON—ADVERSE TITLE—LIEN. Where a tenant in common pays a tax judgment and takes an assignment of the judgment, the certificate is merged in the judgment, and the payment operates for the benefit of the remaining tenants in common, subject to a lien for their portion of the tax; under Rem. & Bal. Code, § 9265, providing that the receipt of redemption money shall operate as a release of all claims by virtue of the certificate, and § 9258, providing that any person interested in lands may pay the taxes and have a lien for the payments made, and § 9259, providing that redemption shall inure to the benefit of the legal or equitable title, subject to the right of reimbursement of the person making the payment. *Trumbull v. Bruce*..... 644
7. TAXATION—TAX TITLES—TAXES PAID—CERTIFICATES—VALIDITY. A certificate of delinquency for taxes that have been paid by the holder of a prior certificate is void, and cannot sustain an action for foreclosure, although the holder paid the taxes for three subsequent years upon which he might have secured a certificate. *Trumbull v. Bruce* 644
8. SAME—DELINQUENCY CERTIFICATE—COST ITEMS INCLUDED. A certificate of delinquency is invalidated by the inclusion of the attorney's fees and other costs of the foreclosure of a prior certificate which are not allowable in such foreclosures. *Trumbull v. Bruce* 644
9. SAME—CERTIFICATE OF DELINQUENCY—PAYMENT OF TAXES DUE. The applicant for the foreclosure of a certificate of delinquency must pay all taxes due and unpaid on the property. *Trumbull v. Bruce* 644
10. TAXATION—TAX TITLES—ACTIONS TO VACATE—LIMITATION OF ACTIONS. An action to cancel a tax deed is barred within three years by Rem. & Bal. Code, § 162, although the tax judgment on which it was based was void for want of jurisdiction. *Baylis v. Kerrick* 410
Fish v. Fear..... 414

TELEGRAPHS AND TELEPHONES:

Condemnation of route for telegraph line, see EMINENT DOMAIN, 1, 4, 7-9.

TENANCY IN COMMON:

Creation of relation, see LANDLORD AND TENANT, 1.

Redemption by cotenant, see TAXATION, 6.

1. TENANCY IN COMMON—ACTIONS—PARTIES—JOINDER. Tenants in common in a prospective crop have a joint right of action for damages through fraud in the sale of seed to one of the tenants. *Fuhrman v. Interior Warehouse Co.*..... 159
2. TENANCY IN COMMON—ACQUISITION OF ADVERSE TITLE—TAX CERTIFICATES. The fact that a tenant in common of community property paid for a redemption from taxes out of her separate estate does not militate against the rule that the redemption inured to the benefit of her cotenants. *Trumbull v. Bruce*..... 644

TIDE LANDS:

Extension of city street over, see NAVIGABLE WATERS.

Cost of fill in streets and alleys, see PUBLIC LANDS, 3.

TIMBER:

See LOGS AND LOGGING.

Wrongful cutting and removal of, see TRESPASS.

TIME:

For grant of voluntary nonsuit, see DISMISSAL AND NONSUIT.

For payment of interest, see MORTGAGES, 2.

TITLE:

To bill or promissory note, see BILLS AND NOTES, 5.

Covenant of title, see COVENANTS.

Of Indian allottee of lands, see INDIANS, 2.

After-acquired title, see MORTGAGES, 3.

Grant of easement to city of street over harbor area as surrender of title by state, see NAVIGABLE WATERS, 2.

Of criminal act, see STATUTES, 4.

Tax titles, see TAXATION, 5-7.

Failure to record tax sale as constituting defect in title of subsequent vendor, see TAXATION, 5.

Of vendor, see VENDOR AND PURCHASER, 2-5.

TORTS:

See LIBEL AND SLANDER; NEGLIGENCE; TRESPASS.

Survival of action for, see ABATEMENT AND REVIVAL.

Action in contract or tort, joinder of, see ACTION, 2.

Measure of damages, see DAMAGES.

Causing death, action for damages, see DEATH.

TORTS—CONTINUED.

- Of husband, see HUSBAND AND WIFE.
- Of employers, see MASTER AND SERVANT.
- Of city, see MUNICIPAL CORPORATIONS, 26, 27, 29-35.
- Agents, see PRINCIPAL AND AGENT, 3.

1. **TORTS—RIGHT OF PRIVACY—PUBLICATION OF PHOTOGRAPH.** The publication of an inoffensive photograph and true likeness of a person, in connection with the story of her father's crime, is not an invasion of the right of privacy for which the law affords any remedy. *Hillman v. Star Publishing Co.*..... 691

TOWNS:

- Change in classification to city of third class, see MUNICIPAL CORPORATIONS, 1.

TRANSFER:

- Of mortgage debt before maturity, see MORTGAGES, 5.

TRESPASS:

- Survival of action for on death of party, see ABATEMENT AND REVIVAL.
- By animals, see ANIMALS.

1. **TRESPASS—CUTTING TIMBER—TREBLE DAMAGES—PENAL STATUTES.** Rem. & Bal. Code, §§ 939, 940, imposing treble damages for cutting and removing any timber "on the land of another person" unless the trespass was "casual or involuntary" or the defendant had "probable cause to believe that the land was his own," has no application where the owner of the fee cut and removed timber that had been reserved from the grant and belonged to another; since the statute is penal and must be strictly construed, and defendant had probable cause to believe that the land was his own, within the proviso fixing single damages. *Skamania Boom Co. v. Youmans* 94

TRIAL:

- Exceptions or objections for purpose of review, see APPEAL AND ERROR, 2, 3.
- Review of error as dependent on presentation of same by record, see APPEAL AND ERROR, 4.
- Review of findings, see APPEAL AND ERROR, 3, 11-13.
- Review of errors as dependent on prejudicial nature of same, see APPEAL AND ERROR, 14-17.
- Review of rulings as dependent on presentation of objections or exceptions in lower court, see APPEAL AND ERROR, 2, 3.
- Of criminal prosecution, see CRIMINAL LAW.
- Instructions in action for wrongful death, see DEATH.
- Dismissal of action, see DISMISSAL AND NONSUIT.
- Condemnation proceedings, see EMINENT DOMAIN.

TRIAL—CONTINUED.

Instructions in action for injury to minors from dynamite caps, see **EXPLOSIVES**.

For personal injuries to servant, see **MASTER AND SERVANT**.

Instructions in action for personal injuries in city street, see **MUNICIPAL CORPORATIONS**, 25, 27.

Instructions in action for breach of warranty that horse was gentle, see **SALES**, 3.

1. **TRIAL—MISCONDUCT OF COUNSEL—ARGUMENT.** A statement of an attorney in argument that he was thoroughly convinced from the facts proven of a certain fact in issue is nothing more than a conclusion and not misconduct requiring a reversal. *Kalberg v. The Bon Marche* 452
2. **TRIAL—DISMISSAL ON OPENING STATEMENT—ADMISSIONS—MASTER AND SERVANT—INDEPENDENT CONTRACTOR.** In an action for personal injuries to an employee, the opening statement of plaintiff's counsel does not admit that the negligence of a superintendent doing the work on a percentage basis was that of an independent contractor, where it was stated that it would be shown that all the men were paid by the defendant and that the superintendent was only a foreman. *James v. Pearson*..... 263
3. **TRIAL—INSTRUCTIONS—FACTS ASSUMED.** An instruction upon demurrage charges may properly assume that the parties had waived provisions requiring written notice of extra work, where that was the established fact. *Gehri & Co. v. Dawson*..... 240
4. **TRIAL—INSTRUCTIONS—STATEMENT OF FACTS.** An instruction concisely informing the jury of the issues is not erroneous in failing to state the case or in failing to state the admitted facts, even though the pleadings were taken to the jury room. *Tibbits v. Spokane* 570
5. **TRIAL—INSTRUCTIONS—REQUESTS—DAMAGES — MINIMIZING LOSS—CARRIERS.** Where the court had instructed the jury generally that a passenger (suing for damages for failure to perform the contract of carriage) is bound to do everything in her power to reduce the damages and cannot complain of consequences flowing from her refusal to do so, it is not error to refuse a request for a more particular instruction on the subject dealing with the particular circumstances of the case. *Harvey v. Tacoma R. & Power Co.*..... 143

UNITED STATES:

As necessary party to proceedings in probate of estate of Indian allottee, see **INDIANS**, 2.

1. **UNITED STATES — DEPARTMENTS — DECISIONS OF INTERIOR DEPARTMENT—CONCLUSIVENESS—INDIANS—LANDS — HEIRSHIP.** Where lands were granted to an Indian by a patent subject to forfeiture if the lands were abandoned and restricting the right of alienation for a

UNITED STATES—CONTINUED.

certain period and until removed by legislative act, and by 27 Stats. at L. 633, exercise of the power of alienation was provided for by sales and conveyances by a commissioner and trustee upon written consent of the allottee, and conveyance was made accordingly, the determination of the question of heirship of a deceased allottee, determined under rules and in the manner provided by the interior department in order to authorize a trustee's sale, is final and *res judicata*. *Little Bill v. Swanson*..... 650

USURY:

As defense in action on note, see **BILLS AND NOTES**, 2.

VACATION:

See **JUDGMENT**, 1.

Of order settling final account and fixing executor's compensation, see **EXECUTORS AND ADMINISTRATORS**, 3.

Of tax deed, see **TAXATION**, 10.

VALUE:

Agreement limiting liability as to value of live stock, see **CARRIERS**, 3.

Excessive valuation of property, see **TAXATION**, 2.

VARIANCE:

Dismissal of prosecution for, see **CRIMINAL LAW**, 1, 3.

VENDOR AND PURCHASER:

Commission on sale of land by broker, see **BROKERS**.

Action for breach of covenants of warranty, see **COVENANTS**.

Alienation of lands by Indian allottee, see **INDIANS**, 1.

Reformation of contract for sale of land, see **REFORMATION OF INSTRUMENTS**.

Transfer of ownership of personal property, see **SALES**.

Specific performance of contract, see **SPECIFIC PERFORMANCE**.

Purchasers at tax sale, see **TAXATION**, 5.

1. **VENDOR AND PURCHASER—CONTRACT—RESTRICTIONS AGAINST ASSIGNMENT—VALIDITY.** A provision in a contract for the sale of real estate that the contract shall not be assigned without the consent of the vendors contravenes no rule of public policy and is enforceable; and other clauses in the contract referring to "assignees" will be taken to mean assignees consented to by the vendors. *Lockerby v. Amon* 24
2. **VENDOR AND PURCHASER — CONTRACTS — PERFORMANCE — TITLE OF VENDOR—UNPAID TAXES.** The vendee's default in the first payment on a land contract is not excused by objections to the title going only to small sums for taxes and assessments which were not yet delinquent, where the contract gave the vendor until that time to

VENDOR AND PURCHASER—CONTINUED.

cure the defects, and he had been notified by the vendee that the vendee would have to default in the payment, after which nothing further was done by the vendee toward acquiring the property; and the vendee cannot thereafter recover a deposit on the ground of defect of title without offering to perform. *Ready v. Sound Investment Co.* 422

3. VENDOR AND PURCHASER—CONTRACTS—TITLE OF VENDOR—FREE SIMPLE—OUTSTANDING EASEMENTS. A vendor cannot convey a "full fee simple title" where the land is subject to an easement for a water ditch. *Wingard v. Copeland*..... 214

4. SAME. In an agreement to convey a full fee simple title free and clear from taxes, mortgages and other liens, the enumeration of taxes, mortgages, etc., does not lessen the force of the stipulation for a fee simple title, and the agreement is not satisfied by a title subject to an easement. *Wingard v. Copeland*..... 214

5. SAME.—An agreement to furnish a full fee simple title is not satisfied by a marketable title subject to an easement. *Wingard v. Copeland* 214

6. VENDOR AND PURCHASER—REMEDIES OF VENDEE—DAMAGES FOR BREACH OF CONTRACT—PLEADING—COMPLAINT—SUFFICIENCY. A complaint by a vendee for damages states a good cause of action, when it alleges the vendor's contract to pave certain streets, its breach of the contract, and damage therefrom, and damages from defendant's failure to construct in a workmanlike manner, certain improvements which it was its duty to construct, and that plaintiff would have paid installments due except for defendant's breach, the same being a sufficient excuse for nonpayment. *Green v. McLaughlin Realty Co.*..... 147

7. VENDOR AND PURCHASER—CONTRACTS—FORFEITURES—RELIEF. The courts cannot relieve from the hardships of defaults provided for in contracts to purchase land, except to grant a period of grace, where warranted by the equities. *Rohlinger v. Coletta Land & Orchard Co.* 348

VERDICT:

Inadequate or excessive damages, see DAMAGES, 4-7.

Excessive damages for wrongful death, see DEATH, 2.

VICE PRINCIPALS:

See MASTER AND SERVANT, 8, 10, 11

VOTERS:

See ELECTIONS.

Submission of bond issue to vote, see COUNTIES, 2-4.

Submission of adoption of commission form of city government to vote, see MUNICIPAL CORPORATIONS, 4.

WAIVER:

See ESTOPPEL.

Error waived in appellate court, see APPEAL AND ERROR, 10.

Of defenses by pleadings in action on note, see BILLS AND NOTES, 4.

Of provision requiring written notice regarding extra work, see CONTRACTS, 2.

Of defect in process by appearance, see INSANE PERSONS, 1.

Of objections to application for building permit, see MUNICIPAL CORPORATIONS, 15.

Revocation of building permit, see MUNICIPAL CORPORATIONS, 16.

Of claim against city, see MUNICIPAL CORPORATIONS, 31.

Of objections to claim filed with city, see MUNICIPAL CORPORATIONS, 33.

Of right to rescind sale, see SALES, 2.

WARNING:

Instructing servant as to dangers of employment, see MASTER AND SERVANT, 5, 6, 16, 22.

WARRANTY:

Joinder of causes arising from breach of, see ACTION, 3.

Covenants of, see COVENANTS.

By insured, see INSURANCE, 2.

On sale of goods, see SALES, 2-4.

WATERS AND WATER COURSES:

See NAVIGABLE WATERS.

Bond issue for harbor improvement, see COUNTIES, 2-4.

Grant of way for ditch across public lands, see PUBLIC LANDS, 2.

1. WATERS AND WATER COURSES—APPROPRIATION ON PUBLIC LANDS—EASEMENT FOR DIVERSION—CHANGE—SECONDARY EASEMENT. The prior appropriator of the waters of a creek, not diverted on his own lands, has no right, under U. S. Rev. St. § 2340, providing that all patents shall be subject to any vested and accrued water rights or rights to ditches in connection therewith, to make any change in the character of the servitude by fixing a new point of diversion or changing the ditch to a pipe line, upon the washing out of the ditch by erosions and slides whereby the water supply was lost, even if the subsequent patentee of the servient estate is not able to make any beneficial use of the water; and such change cannot be sustained as a "secondary" easement to enter and repair the ditch. *White Bros. & Crum Co. v. Watson* 666
2. WATERS AND WATER COURSES — APPROPRIATION — PRIORITY — DILIGENCE—EVIDENCE—SUFFICIENCY. An appropriation of water, prior to the vesting of riparian rights in 1897, by the application of water to irrigation purposes, is not established, reasonable diligence being lacking, where an irrigation company first started an appropriation in 1893, which was forfeited by the failure of the company and

WATERS AND WATER COURSES—CONTINUED.

- abandonment of the work, and that was followed by slight efforts toward the use of water in 1897, and an appropriation and considerable diligence in 1897. *Still v. Palouse Irrigation & Power Co.* 606
3. WATERS AND WATER COURSES—RIPARIAN RIGHTS—NATURAL FLOW—FLOOD WATERS. A lower riparian owner is entitled to the natural flow of the stream at regular flood seasons beneficially flooding his lands, and can restrain the impounding of such flood waters by an upper riparian owner, and their release during the summer months, to his damage, where such waters are not extraordinary and unprecedented but a usual and natural condition. *Still v. Palouse Irrigation & Power Co.*..... 606
4. WATERS AND WATER COURSES—RIPARIAN RIGHTS—APPROPRIATION—STATUTES. The doctrine of riparian rights for irrigation purposes as to lands acquired from the government subsequent to March 3, 1877, has not been abrogated by the act of that date (19 Stat. at L. 377), providing that surplus waters over and above actual appropriation and use, and waters in all lakes and rivers upon the public domain, shall remain and be free from the appropriation and use of the public for irrigation, mining, and manufacturing purposes, subject to existing right; since the act relates only to the reclamation of desert lands. *Still v. Palouse Irrigation & Power Co.*.... 606
5. WATERS AND WATER COURSES—WATERWAY DISTRICTS—ORGANIZATION. The fact that a commercial waterway district is in court contending for the validity of a judgment declaring in its favor, is sufficient evidence that it is maintaining its existence and entitled to the benefits of curative acts passed since the institution of the suit. *State ex rel. Bussell v. Abraham*..... 621
6. SAME—STATUTES — CURATIVE AND RETROACTIVE LAWS — CONSTITUTIONAL LAW—OBLIGATION OF CONTRACT. The commercial waterway district law (Rem. & Bal. Code, § 8166 *et seq.*) having been declared unconstitutional because of its failure to provide lawful means for levying the assessments authorized, it was competent for the legislature by retroactive acts (Laws 1911, pp. 10-46), to legalize and validate attempted organizations and all district indebtedness under the old law, except assessments, and to add provisions curing defects in the old law by virtue of which lawful assessments could thereafter be made; since it does not impair the obligation of a contract. *State ex rel. Bussell v. Abraham*..... 621
7. WATERS AND WATER COURSES — CONTRACTS — RIGHT OF WAY FOR DITCH—PAROL LICENSE—REVOCATION — WHO MAY QUESTION. Where the owner of lands gave a right of way for a ditch in consideration of an agreement for water for irrigation purposes, the water to be taken out on his own land, the owner of the ditch cannot defeat such taking and use by invoking the rule that permission to maintain the ditch was revocable at will as a parol license, or void as

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attempting to create an interest in lands by parol, within the statute of frauds; since the water in the ditch was subject to an agreement for its use as any other personal property. *Methow Cattle Co. v. Williams*..... 457

8. **WATERS AND WATER COURSES—IRRIGATION—USE—RELIEF.** Equity will not, at the suit of a riparian owner, restrain the use of water diverted from a creek and required for irrigation by an adjoining owner, where ample water is left for all uses of the riparian owner, who suffers no damage from the diversion complained of. *Methow Cattle Co. v. Williams*..... 457

WAYS:

Private ways, see **EASEMENTS**.

Public ways, see **HIGHWAYS**.

WHARVES:

Construction of in streets extending across harbor area as taking of property without due process of law, see **CONSTITUTIONAL LAW**, 2.

Construction of in street extending across harbor area, see **MUNICIPAL CORPORATIONS**, 18.

WILLS:

Construction of as moot question, see **APPEAL AND ERROR**, 9.

Judicial notice of practice of making mutual wills, see **EVIDENCE**, 1.

Decree of distribution as construction of will, see **EXECUTORS AND ADMINISTRATORS**, 1, 2.

1. **WILLS—CONTRACTS TO DEVISE—MUTUAL WILLS—REVOCATION—ESTOPPEL TO REPUDIATE—HUSBAND AND WIFE—COMMUNITY PROPERTY—ELECTION TO TAKE UNDER WILL—EVIDENCE—SUFFICIENCY.** The intention of the parties to make provision for their children, with all the aspects of a contract which is irrevocable by the survivor after the death of the other, is clearly shown, and the widow makes an election which she cannot subsequently repudiate by claiming a community interest in lands devised by mutual wills to their children, where it appears that husband and wife, following a policy to advance \$1,000 to each of their children, there being three minors still unprovided for, executed mutual wills devising to two minor sons specified tracts of community property, each charged with the payment of \$500 to a minor daughter, that wills instead of deeds were made on the advice of an attorney because of the minority of the sons and their supposed inability to contract for the charges thereon, and that, at the same time, a deed of property was made to another child, and a writing signed by the heirs, releasing all claims to the estate in consideration of the advances; and where, on the death of the husband, the widow offered his will for probate and accepted the benefits of devises to her of portions of the hus-

WILLS—CONTINUED.

band's separate and community lands, and bequests of personal property, which she converted to her own use. *Prince v. Prince* 552

2. WILLS — PROBATE OF FOREIGN WILL — ANCILLARY ADMINISTRATION. The probate of a foreign will upon a foreign certificate of probate, is not ancillary to the foreign proceeding in such sense that the final distribution of real property located in this state passing under the will would not be a final construction of the will. *Alaska Banking & Safe Deposit Co. v. Noyes*..... 672

WITNESSES:

Experts, see EVIDENCE, 6.

Corroboration of female in prosecution for rape, see RAPE.

1. WITNESSES—QUALIFICATIONS—AGE — DISCRETION. Whether a boy nine years of age is competent to testify to an occurrence that happened three years previously, rests largely in the discretion of the trial judge, and admission of his testimony will not be disturbed when no abuse appears, and the jury were properly instructed as to its weight and their right to disregard it if they believed that he was testifying to his belief from suggestions rather than from an actual remembrance of the facts. *Kalberg v. The Bon Marche* 452
2. WITNESSES—COMPETENCY—TRANSACTIONS WITH DECEASED. In an action by the heir of a deceased grantor in a deed of gift, testimony of the grantee that he had possession of the deed very soon after its date and had kept it in his trunk ever since, is not inadmissible as evidence of a transaction had with the deceased, within Rem. & Bal. Code, § 1211, excluding such testimony. *Bardsley v. Truax*.... 400
3. WITNESSES—CROSS-EXAMINATION—DISCRETION. It is not an abuse of discretion to refuse unlimited repetition in cross-examination, after inquiry of sufficient length to elucidate the fact as far as the witness is able to detail it. *State v. Blaine*..... 122
4. WITNESSES—CROSS-EXAMINATION. Where the defendant testified that he had been acquitted in police court of any offense in connection with running down a pedestrian, it is proper, on cross-examination, to require him to state for what offense he was tried. *Segerstrom v. Lawrence*..... 245
5. WITNESSES—CROSS-EXAMINATION—IMPEACHMENT OF PARTY. Cross-examination of the plaintiff as to his carelessness in heeding a warning does not make him the defendant's witness so as to preclude other testimony contradicting him on that point. *Allard v. Northwestern Contract Co.*..... 14
6. WITNESSES—CROSS-EXAMINATION — CRIMINAL LAW — PRIVILEGE OF ACCUSED—EVIDENCE OF FORMER CONVICTION. It is not a violation of the constitutional guaranty of a fair trial that the court compelled the accused on cross-examination to testify to a former conviction,

WITNESSES—CONTINUED.

under Rem. & Bal. Code, § 2290, providing that it shall be competent in a criminal proceeding to show the former conviction of a witness by cross-examination, where the jury were instructed that evidence of a former conviction could be considered only for the purpose of determining the weight to be given to his testimony.
State v. Blaine..... 122

WOODS AND FORESTS:

Cutting or carrying away timber, see **TRESPASS**.
 Loggers' liens, see **LOGS AND LOGGING**.

WORK AND LABOR:

Building contracts, see **CONTRACTS**.
 Liens for work on timber products, see **LOGS AND LOGGING**.

WRITINGS:

Compelling production of, see **EVIDENCE**, 2.
 Parol evidence to vary, see **EVIDENCE**, 5.

WRITS:

See **ATTACHMENT; INJUNCTION; REPLEVIN**.

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